DOCKET

SUPREME COURT

OF THE UNITED STATES

No. 09-8854 *** CAPITAL CASE ***

Title: Demarcus Ali Sears, Petitioner
v.
Stephen Upton, Warden

Docketed: January 29, 2010
Lower Ct: Supreme Court of Georgia
Case Nos.: (S08E1253)
Decision Date: September 28, 2009

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Dec 15 2009	Application (09A590) to extend the time to file a petition for a writ of certiorari from December 27, 2009 to January 27, 2010, submitted to Justice Thomas.
Dec 24 2009	Application (09A590) granted by Justice Thomas extending the time to file until January 27, 2010.
Jan 26 2010	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due March 1, 2010)
Feb 18 2010	Brief of respondent Stephen Upton, Warden in opposition filed.
Feb 26 2010	Reply of petitioner Demarcus Ali Sears filed.
Mar 4 2010	DISTRIBUTED for Conference of March 19, 2010.
Mar 17 2010	Record Requested .
Mar 29 2010	Record received from the Supreme Court of Georgia and the Superior Court of Butts County State of Georgia (1 box).
Apr 1 2010	DISTRIBUTED for Conference of April 16, 2010.
Apr 8 2010	Record received from Butts County Superior Court State of Georgia (Transcripts of trial, 2 boxes).
Apr 15 2010	DISTRIBUTED for Conference of April 30, 2010.
May 10 2010	DISTRIBUTED for Conference of May 13, 2010.
May 17 2010	DISTRIBUTED for Conference of May 20, 2010.
May 24 2010	DISTRIBUTED for Conference of May 27, 2010.
Jun 1 2010	DISTRIBUTED for Conference of June 3, 2010.
Jun 7 2010	DISTRIBUTED for Conference of June 10, 2010.
Jun 14 2010	DISTRIBUTED for Conference of June 17, 2010.
Jun 21 2010	DISTRIBUTED for Conference of June 24, 2010.
Jun 24 2010	DISTRIBUTED for Conference of June 28, 2010.
Jun 29 2010	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED. Judgment VACATED and case REMANDED Justice Scalia filed a dissenting opinion joined by Justice Thomas. The Chief Justice and Justice Alito would deny the petition for a writ of certiorari. Opinion per curiam.

	(Detached Opinion)
Aug 2 2010	MANDATE ISSUED.
Aug 3 2010	Record returned to Supreme Court of Georgia.
Aug 3 2010	Record returned to Butts County Superior Court.

PETITION FOR WRIT OF CERTIORARI

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

09-8854

No. 09-A-590

DEMARCUS A. SEARS,

Petitioner,

Versus,

STEVEN UPTON, Warden.

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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CAPITAL CASE

QUESTION PRESENTED

I. Upon having found that capital trial defense counsel was constitutionally deficient in their penalty phase preparation, may the state habeas court find an absence of prejudice merely because it is impossible to know how the capital trial jury would have reacted to evidence of Petitioner's substantial mental health impairments and other mitigating factors trial counsel failed to present?

II. Does imposing the death penalty for the offense of kidnaping with bodily injury violate the Eighth Amendment prohibition on cruel and unusual punishment?

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SEARS V. HALL, WARDEN, Case No. 2000-V-27, Superior Court of Butts County, unpublished order of January 7, 2008

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SEARS V. HALL, WARDEN, Case No. S08E1253, Supreme Court of Georgia unpublished order of September 28, 2009

Order denying Application for Certificate of Probable Cause to Appeal (See Appendix B)

IN THE
SUPREME COURT OF THE UNITED STATES

No. 09-A-590

DEMARCUS SEARS,

Petitioner

Versus,

STEVEN UPTON, Warden,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

Mr. Sears respectfully petitions this Court to review the decision of the Supreme Court of Georgia denying review of a final judgment rendered by the Superior Court of Butts County, Georgia, and to require application of a standard of prejudice to his claim of ineffective assistance of counsel that is consistent with the requirements of the United States Constitution, and not in conflict with *Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Williams v. Taylor*, 529 U.S. 362 (2000); *Kyles v. Whitley*, 514 U.S. 419 (1995); *Penry v. Lynaugh*, 492 U.S. 302, 327 (1989); *Strickland v. Washington*, 466 U.S. 668 (1984), *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976), and *Gregg v. Georgia*, 428 U.S. 153,193, 197 (1976). The state court hearing Petitioner's habeas corpus petition (herein after "Habeas Court") found that Petitioner's capital trial counsel were constitutionally deficient in their preparation for the penalty phase of his

capital trial, including failing to commission a mental health evaluation of Petitioner. Because the Habeas Court applied a clearly erroneous standard for finding prejudice, the State of Georgia has failed provide a fair opportunity for Petitioner's debilitating mental health impairments to be considered either during the penalty phase of his trial, on direct appeal or pursuant to post conviction proceedings. Relief from the application of this patently erroneous standard of prejudice and a remand to the state courts for proceedings consistent with the proper standard will best maintain the system of remedies intended by Congress in enacting 28 U.S.C. §§ 2254(d) and 2254(e).

JURISDICTION AND LOWER COURT OPINION

Jurisdiction is invoked under 28 U.S.C. § 1257 (a).

The final judgment and decree rendered by the Supreme Court of the State of Georgia on September 28, 2009 denying Petitioner's Application for a Certificate of Probable Cause to Appeal the decision of the Superior Court of Butts County is attached as Appendix A. The unpublished opinion of the Superior Court of Butts County, Georgia, entered on January 7, 2008 is reprinted at Appendix B. Record Excerpts showing that Petitioner presented substantial evidence of his mental health impairments at the time of his offense at the state habeas corpus evidentiary hearing are attached as Appendix C and referenced in this Petition.[1] Appendix D

[1] Petitioner references the Habeas Corpus Evidentiary Hearing Transcript as "HT" and the capital trial transcript as "TT." Appendix C includes extensive excerpts from the affidavits and reports of the expert witnesses called at the state habeas corpus evidentiary hearing, as well as excerpts from those experts testimony at the state habeas evidentiary hearing. The detailed record references in Appendix C are included to demonstrate that Petitioner presented substantial evidence that he suffered from mental impairments which impaired his judgment and perception at the time of his

shows that Petitioner raised the Questions Presented in the state court proceedings below.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to... have the Assistance of Counsel for his defense. U S. CONST. Amendment VI;

The Eighth Amendment to the Constitution:

> [N]or [shall] cruel and unusual punishments [be] inflicted. U.S. CONST. Amendment VIII;

The Fourteenth Amendment to the Constitution:

> [N]o State shall . . . deprive any person of life [or] liberty . . . without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. CONST. Amendment. XIV.

STATEMENT OF THE CASE

A. Pretrial

Immediately following the arrest of Petitioner Demarcus Sears and his co-defendant, Phillip Williams, on November 1, 1990 in Hamilton County, Ohio, Mr. Sears, who was eighteen-years-old at the time, confessed his involvement in the kidnapping, rape and murder of Gloria Ann Wilbur. Petitioner was extradited back to Cobb County, Georgia, the venue of Ms. Wilbur's abduction from a parking lot, to face capital charges. The Superior Court found Petitioner to be indigent and appointed two attorneys to represent him. The Cobb County grand jury indicted

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crime, evidence that was unaddressed by the findings of the Habeas Court, which failed to address the proper question.

Mr. Sears on charges of kidnapping with bodily injury and armed robbery. Petitioner was neither indicted nor tried for murder in Georgia; he was sentenced to death for the offense of kidnapping with bodily injury as provided for in O.C.G.A. §16-5-40(b).

Sears's trial counsel testified during the state habeas proceedings that his behavior prior to trial was odd and inappropriate to his circumstances:

> Upon meeting Mr. Sears and listening to his taped confession, we were impressed by the bizarre affect he presented both in speech and demeanor. He presented an absence of control or reflection concerning the appropriateness of his speech, an absence of an appreciation of the seriousness of his circumstances, and an inability or unwillingness to contain his fantasies about himself, such as imagining himself as a 'gangster rap star.' We were puzzled by his erratic nature.

(P. Ex. 41, HT 1853-54). Trial counsel believed Petitioner's behavior was so erratic as to warrant an evaluation by a defense mental health expert. (*Id.* at 1854). Trial counsel testified that given the nature of Petitioner's crime and that fact that he faced a capital prosecution, they knew that a defense mental health expert would be required to help explain, or at least mitigate, the crime before a jury. (*Id.*).

As found by the Georgia Habeas Court in its final order denying Mr. Sears habeas corpus relief, Sears's counsel spent *part of one day* attempting to develop mitigation evidence for the penalty phase. They met with Petitioner's mother, Virginia Sears, at the Sears home while Petitioner's father was absent on a business trip. (P. Ex. 22, HT 1658). Counsel had instructed Mrs. Sears to gather family members, friends and community members at her home. (P. Ex. 22, HT 1657-1658). Trial counsel's contemporaneous notes reveal that their goal was to

locate "anybody to say something good about Demarcus." (P. Ex. 44, HT 2151). Those interviews revealed that Petitioner had been a mild-mannered teenager who struggled with school but had no history of violence. (*See e.g.*, P. Ex. 21, HT 1636, P. Ex. 25, HT 1670, P. Ex. 26, HT 1684-5, P. Ex. 27, HT 1690, P. Ex. 29, HT 1699-70, P. Ex. 30, HT 1703, P. Ex. 32, HT 1709-10, P. Ex. 33, HT 1720-21, P. Ex. 34, HT 1728-29, P. Ex. 39, HT 1755 30). Petitioner's mother characterized his school problems as "behavioral." (P. Ex. 44, HT 2179). Two of the interviewees responded positively to the suggestion that Petitioner might have a mental defect. (P. Ex. 32, HT 1711; P. Ex. 34A, HT 1730; P. Ex. 45, HT 2296) One of these interviewees, a family friend who worked as a psychiatric nurse, emphatically stated that she had encouraged Petitioner to seek professional psychiatric help for some time (P. Ex. 44, HT 2292-94, 2296). Following these interviews, Trial Counsel filed a motion for the assistance of a psychiatrist to aid the defense, designated "Defense Motion #11." (ROA-1 at 141-308, 208-209.)

Counsel did not conduct any further penalty phase investigation. The discovery rules then in place required that, should an indigent defendant consult an expert at county expense, the expert's conclusions would be discoverable by prosecutors. *Sabel v. State*, 248 Ga. 10, 18, 282 S.E.2d 61, 68-69 (1981). *Sabel* required that the expert's findings be put in writing and made available to the State. *Id.* *Sabel* further held that "if the defendant does not call the expert as a witness, the state may call the defendant's expert without adding his or her name to the list of witnesses, or may argue to the jury that the defendant would have called

the expert had the result of the testing been favorable to the defendant." *Id.* at 69. Trial counsel testified Cobb County prosecutors frequently and successfully invoked the *Sabel* rule, including "successfully secur[ing] jury instructions permitting jurors to draw an adverse inference from the fact that an expert had been retained by the defense, but not called as a witness for the defense at trial." (P. Ex. 41, HT 1856). When it became apparent that they would secure no relief from the application of *Sabel*, trial counsel withdrew their motion for a defense psychiatric expert.[2] They did not place a proffer of their reasons for withdrawing the motion on the record.

The Trial

Following a short trial, Mr. Sears was found guilty of kidnaping with bodily injury and armed robbery by a jury in Cobb County, Georgia, on September 22, 1993. The penalty phase was heard on September 23, 1993. The Defense called seven witnesses to provide testimony in mitigation. Only one of these witnesses, Virginia Sears (Demarcus Sears's mother), was a family member. Frank Sears (Demarcus Sears' father), Demetrius Sears (Demarcus Sears's brother), and Petitioner's two younger twin sisters did not testify on his behalf. Each witness for the Defense testified to substantially the same facts -- that Petitioner generally was a good boy and average teenager, that they were shocked to learn that he had committed the crimes for which he was found guilty, and that executing Petitioner

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[2] Trial counsel testified "if there had been no downside to [operating under *Sabel*] we would have had [Petitioner] evaluated." (Res. Ex 125, HT 5174). The Habeas Court held that trial counsel's failure to investigate their client's circumstances was so egregious that they lacked a reasonable basis upon which to make this decision. (Appendix B at 29).

would have a hurtful impact on the Sears family.[3] The testimony concerning Petitioner's purported normalcy became so repetitious that trial counsel noted to the Court that, "[he] was going to ask this [witness] a lot fewer questions than [he had] been doing, because it's getting a little repetitious." (*Id.* 2448).

Mrs. Sears testified that her son had "enough money to buy a lot of clothes" and that "the children's father has always provided them with a bank account since they were day one, so they had money in the bank [a]nd they were given access to take out money for certain things." (TT 2391). Mrs. Sears also told the jury that she lived in a nice, middle class neighborhood and that the Searses worked very hard and bought their own home. (TT 2394, 2395). The jury heard that families in Petitioner's neighborhood owned automobiles and boats, and that Petitioner was not underprivileged. (*Id.* 2395-2396). Kelly Spencer told the jury that Petitioner had "some pretty nice parents and nice home to go, ..." (*Id.* 2417), that no one abused him, and that he was not underprivileged in any way. (*Id.* 2417). Evelyn Mercer, a friend of Petitioner's mother, testified:

> It's not like Demarcus was in the inner city. The school system in which he attended and the place where he lives is a middle class area. And it's about eighteen miles from the city, so it's not like he was just thrown out like an alley cat or something like that.

(*Id.* 2440). This testimony was highlighted and reinforced time and again by the prosecution during closing argument. (*Id.* 2473-75). The prosecution argued without objection or rebuttal:

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[3] *See Id.* 2375, 2376, 2378, 2379, 2380-87, 2401-02, 2404-05, 2412-16, 2424-29, 2439, 2450-51.

> Now, there's no dispute -- excuse from the standpoint of the background under which Demarcus Sears grew up. We don't have a deprived child from an inner city; a person who society has turned its back on at an early age. But, yet, we have a person, privileged in every way, who has rejected every opportunity that was afforded him.

(*Id.* 2475).

Trial counsel's closing argument in response was merely that:

> [M]itigation is never intended to try and excuse or justify what was done. Nothing can excuse it; nothing can justify it. . . . And I'm not going to tell you that the Defendant is a great person, because if he were a great person he wouldn't be facing one of society's two most ultimate punishments.

(*Id.* 2495).

The court charged the jury and delivered the evidence and verdict forms by four in the afternoon of September 23, 1993, and the jury began deliberating. Mr. Sears's jurors divided over the appropriate sentence, deliberating over the course of three days and repeatedly sending notes to the trial court, twice indicating that they were hopelessly deadlocked. (TT 2561, 2673, 2587-89, 2604-2611). Under instructions from the court regarding the desirability of agreement (TT 2581-82, 2606-08), the jurors' deliberations grew "hostile." The final juror who supported a life sentence was mocked, insulted and shunned by her fellow jurors. The other jurors also threatened her with prosecution for perjury on the basis of her voir dire answers in which she indicated that she could impose the death penalty. (3-17-98 PHT at 34-47). The life-sentence juror succumbed to the other jurors' coercion only after Cobb County Superior Court Judge Mary Staley rejected the juror's requests

for protection from their misconduct. (TT 2589, 2606-07). The jury returned a death sentence for the offense of kidnaping with bodily injury on September 25, 1993, finding the existence of four statutory aggravating circumstances.

B. Post-trial

The trial court denied Mr. Sears's Motion for New Trial on July 18, 1996. Mr. Sears filed a timely notice of appeal on August 19, 1996. In *Sears v. State*, 268 Ga. 759, 493 S.E.2d 180 (Ga. 1997), the Georgia Supreme Court denied Petitioner's appeal of his convictions but remanded to the trial court for further factual development of the record with regard to sentencing phase jury misconduct. The Court then affirmed the death penalty following remand. *Sears v. State*, 270 Ga. 834, 514 S.E.2d 426 (1999), *cert. denied*, 528 U.S. 934, *rehearing denied*, 528 U.S. 1040 (1999). The Georgia Supreme Court found that Petitioner lacked standing to challenge the application of the *Sabel* rule on appeal because his counsel had withdrawn their motion for funds to retain a psychologist or psychiatrist and therefore no expert findings were subject to discovery under *Sabel*.[4] Mr. Sears filed his Petition for Writ of Habeas Corpus in the Superior Court of Butts County on January 13, 2000. Following an evidentiary hearing on January 19, 2006, Judge John E. Girardeau, sitting by designation, entered an order denying Mr. Sears's petition on January 7, 2008.

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[4] *Rower v. State*, 264 Ga. 323, 443 S.E.2d 839 (1994), overruled *Sabel*, finding the *Sabel* doctrine violates an indigent defendant's right to due process of law. Petitioner was unable to obtain relief under *Rower* because his trial counsel had withdrawn their motion for funds to retain a psychiatrist

The evidence presented at the habeas corpus hearing showed that Petitioner suffered at the time of his crime from a profound impairment of his fontal lobe, resulting from childhood injuries and exacerbated by adolescent drug abuse. A neurophysiologist (Tony Strickland, PhD) and psychiatrist (Richard Dudley, M.D.) testified that Mr. Sears suffered from substantial mental impairments at the time of his crime, caused by organic brain damage and a severely abusive and neglectful upbringing. The facts concerning Petitioner's upbringing substantiated the expert findings of impairment. Instead of a supportive family, the evidence showed a history of neglect, physical, sexual and emotional abuse. Petitioner's parents fought physically, separated repeatedly and divorced once during his childhood. They left him unattended at times and on other occasions left him in the care of a sexually abusive relative. (HT 1667, 1681-82, 1696, 1700, 1704). Records never sought by trial counsel documented Petitioner's developmental difficulties and emotional abuse. Witness testimony not procured by trial counsel revealed a history of severe developmental and family problems, directly contradicting the trial testimony of Petitioner's mother and her friends, who attempted to portray Petitioner and his childhood environment as "normal."

The expert evaluations found both that substantial impairments existed,[5] and that they were likely even more crippling at the time of Mr. Sears's crime. Both

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[5] Three impairments act in concert to diminish Mr. Sears's capacity for reasoned behavior (and thus his culpability): (1) a cognitive impairment resulting from damage to the frontal lobes of his brain; (2) a mood disorder, specifically major depression and a severe anxiety disorder; and (3) a psychiatric disturbance characterized by extreme impulsiveness, inappropriate affect, grandiose and magical thinking, and a tenuous connection with reality. This is particularly true in stressful circumstances such as he found himself on the day of the crime, when his mother refused to help him return home

mental health experts testified that an evaluation by any appropriately qualified professional would have alerted trial counsel to their existence. (HT 81-84; P. Ex. 1, HT 150; P. Ex. 3, HT 245, 275-277) (*See* Appendix C).

The Habeas Court nonetheless denied Mr. Sears's claim of penalty phase ineffective assistance of counsel by concluding that he had demonstrated no prejudice to the outcome of his sentencing proceeding. The Habeas Court inexplicably made no findings with regard to the extensive evidence of Mr. Sears's disturbing family background and overwhelming impairments. The Habeas Court instead applied the following prejudice standard:

> Although here the Petitioner can argue that a prior appeal shows the difficulty one juror was having reaching the same verdict as the others, it is just not possible to know what effect a different mitigation theory would have had on her, just as it is impossible to know what effect it would have had on other jurors.

(Appendix B at 30). Distinguishing this case from one where no mitigation case is presented, the Habeas Court found that "*[b]ecause [trial] counsel put forth a reasonable theory with supporting evidence*, Mr. Sears has failed to meet his burden of proving that there is a reasonable likelihood that the outcome at trial would have been different if a different mitigation theory had been advanced." (Appendix B at 30) (emphasis supplied). As a result, the Georgia Habeas Court concluded that Petitioner had not carried his burden of proving that he was prejudiced by trial counsel's deficient penalty phase preparation. The court further

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to Cincinnati from Atlanta, where he and Mr. Williams were stranded, immediately prior to Ms. Wilbur's abduction. (P. Ex. 3, HT 245, 273).

found that Petitioner's claim that his sentence of death was arbitrary and disproportionate to his crime was precluded from further review as res judicata. (Appendix B at 7, 13-14).

Petitioner filed a timely Application for Certificate of Probable Cause to Appeal, which was denied. In his Application Petitioner raised the questions presented and the conflict between the standard applied by the habeas court and the rulings of this Court. (*See* Appendix D).

REASONS FOR GRANTING THE WRIT

I. THE WRIT SHOULD BE GRANTED BECAUSE THE STANDARD OF PREJUDICE EMPLOYED BY THE GEORGIA COURTS IS CONTRARY TO ESTABLISHED REQUIREMENTS OF DUE PROCESS AND THE RIGHT TO COUNSEL

The subjective and impossible to satisfy burden of proving prejudice imposed by the Georgia courts in this case conflicts with the objective reasonable likelihood test mandated by *Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Williams v. Taylor*, 529 U.S. 362 (2000); *Kyles v. Whitley*, 514 U.S. 419 (1995); and *Strickland v. Washington*, 466 U.S. 668 (1984). To permit a death sentence to stand where unprepared counsel presented a show trial mitigation case that suited the defendant's mother would undermine the fundamentals of due process necessary to a constitutional sentencing scheme. *Gregg v. Georgia*, 428 U.S. 153,193, 197 (1976). The Georgia Habeas Court's detour from the correct standard resulted in a failure to address the proofs of prejudice and frustrates the purpose of requiring a Petitioner to exhaust state post-conviction remedies. Requiring a petitioner to bear a daunting burden of proof not applied to other habeas petitioners

defeats both the congressional intent to rely upon state adjudications of federal constitutional issues in death penalty cases and undermines the fundamental fairness of our system. *See* 28 U.S.C. § 2254. In asking the Court to hear this case, Petitioner is not asking the Court to reweigh evidence previously addressed by a state court, but is simply asking the Court to apply the correct constitutional standard to mitigating evidence that is not substantially in dispute.

Mental health problems are a national concern and impact families of every income bracket and background. When a capital defendant has not had a fair opportunity to present evidence of his mental illness at his trial as a result of his counsel's preconceived ideas regarding his middle class background, he should have a meaningful opportunity to have that evidence considered in a post conviction hearing. To uphold the death penalty when a defendant lacked meaningful assistance from counsel on the basis of a presumption that jurors unpersuaded to exercise mercy by a veneer of middle class normalcy would also have been unmoved by evidence of mental illness and abuse undermines the trust we are required to place in juries by the Constitution and due process of law.

A. A Constitutional Death Penalty Requires Fair Consideration of Mitigating Mental Health Evidence

The constitutionality of the statutory scheme of the death penalty in Georgia is predicated upon fair consideration during the penalty phase of the defendant's mental health, including his emotional health and cognitive ability. *Gregg v. Georgia*, 428 U.S. 153,193, 197 (1976). Holding in *Gregg* that the death penalty is not inherently unreliable or unfair, this Court referenced with approval the

Proposed Official Draft of the American Law Institute Model Penal Code as providing a system for measured consideration of the "main circumstances that should be weighed and *weighed against each other.* Those included whether "[a]t the time of the murder the capacity of the defendant to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disorder or defect or intoxication." 428 U.S. at 193, n. 44. In its consideration of Georgia's bifurcated capital trial system, *Gregg* found that the Georgia system of conducting a separate penalty phase met the constitutional standard for non-arbitrary imposition of the death penalty, in part because "the jury's attention is focused on the characteristics of the person who committed the crime" including "any special facts about this defendant that mitigate against imposing capital punishment (e.g. his youth, the extent of his cooperation with the police, *his emotional state at the time of the crime.)*" *Gregg,* 428 U.S. at 197. (emphasis supplied).

Petitioner's habeas evidence demonstrated that his ability to conform his conduct to the dictates of society was severely compromised by frontal lobe injuries and a childhood of abuse and neglect. Yet, as a result of the error in legal standard, no consideration was given to those proofs on their own merits; instead it was presumed that *any* mitigation case is sufficient to avoid a finding of prejudice resulting from the functional absence of counsel.

Petitioner's compromised capabilities and emotional state were not a matter of speculation; the proofs adduced by Petitioner were unrefuted by Respondent and

plainly required the attention of a fact-finder guided by the correct legal standard. At the state habeas evidentiary hearing, Petitioner proved that he suffers from 1) damage to the frontal lobes of his brain, 2) major depression and an anxiety disorder and 3) a psychiatric disturbance characterized by extreme impulsiveness, inappropriate affect, grandiose and magical thinking and a tenuous connection with reality. (P.Ex.3, HT 245, 273).

Both the psychiatrist and the neuropsychologist who testified in the habeas proceedings found that Petitioner's neurological impairment was obvious upon evaluation, and both were struck by the severity of his symptoms. During his evaluation, Dr. Dudley, the psychiatrist associated by undersigned counsel, observed that Petitioner "lacked forethought and judgment, was unable to identify relevant possibilities or options when presented with a problem, was unable to organize or weigh alternatives even when [presented with] varying choices/answers," that "his discourse was overly spontaneous and tangential," that "much of his behavior was oddly inappropriate," and that "his mood was labile and he was easily agitated." (P.Ex. 3, HT 246). Dr. Strickland, the neuropsychologist associated by undersigned counsel, confirmed these deficits through administration of a complete battery of neuropsychological tests. Most notably, on normed measures of planning ability and impulse control, Petitioner's scores fell at or below **the first percentile**, placing him at the bottom of the "severely-impaired" range. (HT 37-38; P.Ex. 1, HT 148).

Petitioner's psychiatric problems, including his overwhelming anxiety and tenuous connection with reality, were also apparent upon evaluation. Dr. Dudley testified that despite Petitioner's "considerable motivat[ion] to portray himself as high functioning," his "profound psychiatric problems became apparent" upon clinical examination. Dr. Dudley observed Petitioner to have no ability to regulate his emotions, cycling rapidly between grandiosity and despair without any obvious environmental stimulus, and that his thinking was often fantastical and implausible. Both experts also testified that given expected recovery curves, the passage of time since Petitioner discontinued his substance abuse, and the ameliorating effect of an institutional environment upon symptoms of brain injury, there is a strong probability that Mr. Sears's symptoms would have been more pronounced at the time of his 1993 trial. In short, there is no question that Petitioner's serious impairment would have been immediately obvious to *any* mental health professional if trial counsel had proceeded with an evaluation prior to trial.

Furthermore, as Dr. Dudley pointed out, Petitioner's mental health symptoms were "consistent with [his] social and developmental history, as outlined in the [habeas] affidavits and other records available to the court, as well as with the history and observations [that Dr. Dudley] gleaned during...clinical interviews with each of [Mr. Sears's] parents." (P.Ex. 3, HT 245). Indeed, both experts' conclusions are well-supported by the records and testimony regarding Mr. Sears's childhood circumstances and early behavior patterns. Petitioner's school records

note Petitioner's lack of insight, the impact of his parents' divorce and the difficulties he suffered as a result of an "overbearing father with unrealistic expectations for his child." (P. Ex. 7, 8 9, HT 508-532). An early psychological evaluation at a local health center showed a substantial gap between Petitioner's word recognition ability and actual reading achievement, documented his visual-motor immaturity and noted that "certain behaviors seem to be interfering with his learning process, including poor direction-following, and lack of self-confidence." (P. Ex. 9, HT 537-540). School records also showed that Petitioner repeated grades and was placed in a Severe Behavior Handicap Unit. A teacher testified that such a placement required "observation of long term problems by school personnel," and not simple "misbehavior." (P. Ex. 34, HT 1726, 1736).

The records and testimony that would have been available to competent counsel also show that Demarcus Sears was neglected, beaten and molested. Throughout Petitioner's early childhood in Virginia, Petitioner's parents had repeated physical fights in front of the children and separated following a fight involving a knife. (HT 1676). Petitioner and his brother were sometimes left in the care of an adolescent male cousin who sexually abused them. (P.Ex. 28, HT 1681-1682). When Petitioner was seven years old, the family moved to Nevada for a year and Petitioner attended second grade there. Upon returning to Cincinnati the following year, Petitioner repeated the second grade. (HT 500-01, 1651). The effects of his cognitive impairment and unhealthy home environment had manifested by the time he entered the third grade, and his teachers referred him for

evaluation at the Lincoln Heights Health Center. (P. Ex. 7, HT 502-511; P.Ex. 9, HT 541-551). As documented in the school and Health Center records – records that the Habeas Court found Trial Counsel did not gather – nine-year-old Mr. Sears lacked self-confidence and struggled to follow directions, with the examiner noting that Mr. Sears's "overbearing" father had "unrealistic expectations" for his learning-disabled son. (P. Ex. 7, HT 505. 508; P.Ex. 9, HT 546).

Both parents used physical punishments on Petitioner. His mother beat him with objects and his father disciplined him with severe and age-inappropriate military-style drills. (HT 263-64, 1622, 1651, 1694, 1721). In 1983, Petitioners mother divorced his father on grounds of "gross neglect of duty." (HT 1095, 1654). She moved to North Carolina with the children and her new boyfriend. Petitioner, then in middle school, witnessed that this relationship was also tumultuous and violent. Petitioner's mother returned to Cincinnati to live with his father when he was in the seventh grade. There educators again noted his deficits in attention, concentration and motivation. (HT 542-43) Once they were reunited, the violence between Mr. Sears's parents escalated to the degree that the children remember fighting as their only interaction. (P. Ex. 19, HT 1624; P.Ex. 21, HT 1639; P.Ex. 32, HT 1713; P. Ex. 33, HT 1721).

When Petitioner reached high school, he was again evaluated, and this time placed in the Severe Behavioral Handicap Unit:

> The SBH Unit in which Demarcus was placed requires observation of long term problems by school personnel. A committee, usually including the school psychologist, evaluates the student's behavior and presents placement

> in the Unit as an option to parents. It requires an IEP (Individualized Education Program) which is a legal document for services. SBH Units are established to serve students with clinically diagnosed emotional/mental disorders, sociopathic tendencies or those who exhibit behaviors indicating the presence of such conditions.

(P. Ex. 34B, HT 1736). Petitioner's teachers noted that he came to the first class of each day agitated, and requiring substantial one on one attention to quell the anxiety that his home life seemed to induce. (P. Ex. 34-A, HT 1728; P. Ex. 36, HT 1741, 1743). He continued to struggle academically, and when school officials and teachers called his father, Frank Sears, to the school to brain-storm solutions, his father berated Petitioner for his ineptitude in front of the entire group:

> I recall also a school conference that I attended to discuss Demarcus's academic performance. Demarcus's father, Demarcus, the school principal, myself, and some of Demarcus's other teachers were all present. I recall that the object of the meeting was to brainstorm about ways to improve his school performance and motivation. I was there to explain to Demarcus's father how talented Demarcus was, and to discuss how we could use the possibility of a career in art to motivate Demarcus. We also planned to discuss how we could reward Demarcus for improved academic performance by giving him extra time in his art classes.
>
> After hearing what I and the other teachers had to say, Demarcus's father began to berate Demarcus in front of all of us. I'll never forget the way he yelled at him. Mr. Sears was so verbally abusive and made such a scene, that it made everyone in the room uncomfortable. I recall looking at the floor to avoid making eye contact with either Demarcus or his father. I felt so bad for Demarcus, he just sat there and took it - he didn't say one word the entire time he was being yelled at.

(P. Ex. 37, HT 1746-47). His father pulled Petitioner out of the Severe Behavioral Handicap Program, and the result was described by one educator as a "disaster." (*Id.* at 1747; P. Ex. 36, 1743; P. Ex. 34-A, HT 1729)

By this point in Petitioner's development, the Sears household was characterized by gross permissiveness. (P. Ex. 26, HT 1683-84). Petitioner's father had little knowledge or involvement in the happenings in his home; he returned from work each day and proceeded straight to his room. (P. Ex. 28, HT 1693; P. Ex. 30, HT 1702; P. Ex. 32, HT 1713; P. Ex. 38, HT 1751). Petitioner's older brother was firmly entrenched in the drug trade; he sold and cooked drugs in the Sears's home. (P. Ex. 26, HT 1684-85; P. Ex. 28, HT 1695; P. Ex. 38, HT 1752). Petitioner's father ignored the brother's illegal behavior and his mother occasionally siphoned his drug profits for her own use. (P. Ex. 26., HT P. Ex. 28, HT 1695-96; P. Ex. 30 at HT 1702; P. Ex. 38, HT 1752). Petitioner would eventually give up on high school not once, but twice. (P. Ex. 9, HT 526, 531).

Petitioner sought ways to escape his difficult existence, both physically and emotionally. Witnesses describe how Petitioner would draw for hours and appeared to be in his own world. (P. Ex. 30, HT 1701; P. Ex. 32, HT 1710). He used marijuana and "primos," a marijuana and cocaine mixture. (P. Ex. 1, HT 150; P. Ex. 32, HT 1707; P. Ex. 38, HT 1752). Petitioner suffered a number of injuries to his forehead, leaving a significant scar. As the expert testimony demonstrated, at the time of his crime Petitioner was suffering from substantial impairment of his

frontal lobe as a result of the combined impact of his repeated head trauma and his adolescent drug use.

The refusal of the Georgia Supreme Court to hear Petitioner's appeal is particularly egregious because it undermines the grounds upon which this Court found the death penalty constitutional in *Gregg*, which included automatic review of death penalties though direct appeals and an assessment of the proportionality of the penalty with reference to other like cases. *Gregg*, 428 U.S. at 198. Neither check on the death penalty could be reliably conducted in this case on direct appeal because Petitioner had no effective representation by counsel at the penalty phase. The unwillingness of the Georgia Supreme Court to conduct habeas review of a death sentence where substantial evidence of mitigating circumstances has been adduced that was unavailable at trial as a result of constitutionally deficient counsel impeaches the validity of the Georgia death penalty under *Gregg*.

B. The Standard of Prejudice Employed by the Georgia Courts Deprived Petitioner of a Fair Opportunity to Present His Mitigating Mental Health Evidence

After finding that no reasonable counsel would have acted as Mr. Sears's trial counsel did in their penalty phase investigation, and that trial counsel lacked a sound basis to withdraw their motion for funds to retain a psychiatrist, the Habeas Court found no prejudice to Mr. Sears. The Habeas Court declined to find that the thoroughly ineffective performance of Mr. Sears's counsel had caused him prejudice because "[i]t is just not possible to know what effect a different mitigation theory would have had" upon Mr. Sears's jurors. (Appendix B at 30). In essence, the

Habeas Court ruled that Mr. Sears's claim must fail because he cannot prove that his jury would have recommended life had his trial counsel met their constitutional obligations and presented the available mitigating evidence.

The Habeas Court thus not only failed to identify the correct standard, but proffered a standard that would effectively foreclose relief for any ineffective assistance of counsel claim. The correct standard for determining prejudice – as promulgated by this Court – states that a defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694. The Habeas Court's standard resembles this standard in neither language nor implication. A standard that would allow a finding of prejudice only when it is "possible to know what effect a different mitigation theory would have had" upon a petitioner's jury would by definition prohibit finding prejudice. Mr. Sears does not dispute that neither the Habeas Court nor anyone else could possibly know what the outcome of his trial would have been had it proceeded upon complete and accurate evidence. Petitioner contends that this very impossibility reveals the error in the Georgia Habeas Court's analysis of his claim. As this standard is clearly erroneous, this Court should grant review.

In further stating that Mr. Sears's case "cannot be fairly compared with those where little or no mitigation evidence is presented and where *a reasonable prediction of outcome can be made,*" the Habeas Court again revealed its misunderstanding of the applicable prejudice standard. (Order at 30) *(emphasis*

added). This Court has not reserved relief for those cases in which the habeas court feels it can reasonably make a retrospective "prediction" of what the long-since-determined outcome of a trial would have been, if only trial counsel had met their obligations. This Court has quite deliberately crafted a standard free of this prognostication, one that directs courts to grant relief not only when they are confident that the defendant's trial would have had a different outcome, but also when counsel's ineffectiveness has undermined confidence that the outcome would have been the same. *Strickland*, 466 U.S. at 694.

By allowing relief when there is a reasonable probability of a different outcome, the proper standard recognizes the limits of retrospect and balances the protection of the defendant's constitutional rights with the interest in finality of judicial outcomes. Even in the current term, this Court has reaffirmed that the test of prejudice is simply a reasonable likelihood of a different result. *Porter v. McCollum*, 558 U.S. ___, 130 S.Ct. 447 (2009) (per curiam). In *Porter*, this Court held that the Florida Supreme Court's conclusion that Porter had not been prejudiced by his counsel's deficiencies was unreasonable. In finding that Porter had been prejudiced by his counsel's failure to present evidence of brain damage and a traumatic background, this Court concluded that "it is not reasonable to discount entirely the effect that [the neuropsychological] testimony **might have had** on the jury or sentencing judge" and that Porter's trauma history "**may have had** particular salience for a jury evaluating Porter's behavior." 130 S.Ct. at 455

(emphasis supplied). The higher standard utilized by the Georgia Habeas Court would leave petitioners like Mr. Porter and Mr. Sears with no means of redress.

Moreover, the Georgia Habeas Court held that Mr. Sears could not show prejudice because "although [Mr. Sears's] counsel failed to investigate thoroughly, they did develop a reasonable mitigation theory with evidence to support it." (Appendix B at 30). This logic contradicts the Habeas Court's own conclusions in assessing the performance of Mr. Sears's trial counsel. If counsel meets their constitutional obligations whenever they "put forth a reasonable theory with supporting evidence," then the behavior of Mr. Sears's counsel that the state habeas court found inadequate – namely, meeting once with a few members of Mr. Sears's family and asking them for "good things" about him – would suffice. This Court has held that "strategic decisions made after less than thorough investigation of law and facts are reasonable precisely to the extent that reasonable professional judgments support limitations on investigation." *Wiggins v. Smith*, 539 U.S. 510, 521 (2003), *citing Strickland*, 466 U.S. at 690-691. Because, as found by the habeas court, counsel were not reasonable in limiting their mitigation investigation to one half day spent interviewing persons assembled by Petitioner's mother and were not reasonable in failing to commission a mental health evaluation, no decision purportedly made there after can be defended as "reasonable strategy." *Id.* The purpose of the penalty phase is not to ensure that the jury hears random positive facts about a defendant, but to focus the attention of the jury on the particularized characteristics of a defendant necessary to insure that the sentence is reliable.

Penry v. Lynaugh, 492 U.S. 302, 327 (1989); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

The Habeas Court also held that the fact that one juror acceded to a sentence of death only after three days of deliberations, numerous charges from the trial court, and coercion and threats from her fellow jurors[6] failed to support Petitioner's claims. (Appendix B at 30). On Mr. Sears's direct appeal, three members of the Georgia Supreme Court ultimately concluded that jurors had improperly coerced the "hold-out" juror into changing her verdict. *Sears v. State*, 270 Ga. 834, 514 S.E.2d 426 (Ga. 1999). The Habeas Court characterizes these events as "the difficulty one juror was having reaching the same verdict as the others." (Appendix B at 30). The fact that one of Mr. Sears's jurors attempted "to strike a different balance" in spite of trial counsel's deficient performance, deficiency which fueled the prosecution's successful attempts to portray Petitioner as spurning the benefits of a supportive middle class upbringing, could well serve to undermine confidence in the outcome of his trial. There is a more than a reasonable probability that the mitigation presentation made in the proceedings below would have buttressed that juror's opposition to a sentence of death, and even given her ammunition with which to sway other jurors to her position.

In short, the standard applied by the Georgia courts flatly contradicts the holding of *Rompilla*:

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[6] *Sears v. State*, 268 Ga. 759, 493 S.E.2d 180 (Ga. 1997); *Sears v. State*, 270 Ga. 834, 514 S.E.2d 426 (Ga. 1999).

> This evidence adds up to a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury, and **although we suppose it is possible that a jury could have heard it all and still have decided on the death penalty, that is not the test.** It goes without saying that the undiscovered 'mitigating evidence, taken as a whole, 'might well have influenced the jury's appraisal' of [Rompilla's] culpability,' *Wiggins*, 539 U.S. at 538 (quoting *Williams v. Taylor*, 529 U.S., at 398), and the likelihood of a different result if the evidence had gone in is 'sufficient to undermine confidence in the outcome' actually reached at sentencing, *Strickland*, 466 U.S., at 694.

Rompilla v. Beard, 545 U.S. 374, 393 (2005) (emphasis supplied), *Accord, Porter*, 130 S.Ct. at 455-456 ("We do not require a defendant to show that counsel's deficient performance more likely than not altered the outcome of his penalty proceeding, but rather that he establish a probability sufficient to undermine confidence in that outcome.")(internal quotations omitted).

Given the jury's tremendous struggle to agree upon a sentence for Mr. Sears, there can be no doubt that "the undiscovered mitigating evidence, taken as a whole, might well have influenced the jury's appraisal of Petitioner's culpability . . . and the likelihood of a different result if the evidence had gone in is sufficient to undermine confidence in the outcome actually reached at sentencing." *Rompilla*, 545 U.S. at 393. Applying this objective test, the conclusion is easily reached that reasonable jurors would have been affected by evidence of a traumatic upbringing and brain pathology that impairs Petitioner's ability to conform behavior to the rules of society. Reasonable jurors would likely consider such evidence to weigh heavily against the death penalty for an eighteen-year-old offender.

II. THE WRIT SHOULD BE GRANTED BECAUSE IMPOSITION OF THE DEATH PENALTY FOR THE CRIME OF KIDNAPING WITH BODILY INJURY VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENT BAN ON CRUEL AND UNUSUAL PUNISHMENT

Petitioner is the only person currently sentenced to death in the State of Georgia for the crime of kidnaping with bodily injury. This sentence is violative of the Eighth Amendment's prohibition[7] on cruel and unusual punishments because it is both a disproportionately severe response to his crime and because it was arbitrary imposed.

The State presented evidence at trial that after Petitioner and his codefendant found themselves stranded in Georgia, miles from their Cincinnati home, they accosted the victim in a grocery store parking lot, placed her in the back seat of her car, and drove north on Interstate 75. According to the testimony of Petitioner's codefendant, Petitioner raped the victim as they drove through Tennessee and sometime after they reached Kentucky, they pulled over and Petitioner escorted the victim from the car and returned without her. The victim's body was later discovered stabbed to death on the highway embankment in Whitley County, Kentucky. (TT 2116-2126); *See also, Sears*, 270 Ga. at 834.

On the basis of this evidence, Mr. Sears was convicted of kidnapping with bodily injury and armed robbery in Cobb County, Georgia. Jurors then were instructed that in order to sentence Mr. Sears to death, they must find the existence of at least one statutory aggravating circumstance and must be satisfied beyond a

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[7] The Eighth Amendment is applicable to the States through the Fourteenth Amendment. *See e.g. Furman*, 408 U.S. at 239; *Robinson v. California*, 370 U.S. 660, 666-667 (1962); *Louisiana ex rel.*

reasonable doubt that Petitioner killed, attempted to kill or intended that deadly force be used by another. (TT 2519, 2525). Following the protracted deliberations described *supra*, jurors fixed Petitioner's sentence at death, finding the existence of four aggravating circumstances pursuant to O.C.G.A. §§ 17-10-30(b)(2) and (b)(7): that the kidnaping was committed during the course of another capital felony, to-wit: rape; that the kidnaping was committed during the course of another capital felony, to-wit: murder; that the kidnaping was committed during the course of another capital felony, to-wit: armed robbery; and that the crime of kidnaping was outrageously and wantonly vile, horrible or inhumane in that it involved torture, depravity of the mind or an aggravated battery to the victim. (TT 2612-2613). The verdict form made no explicit finding that the jurors unanimously found beyond a reasonable doubt that Petitioner killed, attempted to kill or intended that deadly force be used by another. Cobb Superior Court Judge Staley pronounced a sentence of death on the kidnaping with bodily injury count and a sentence of life imprisonment on the armed robbery count.

Though the State of Kentucky initiated a murder prosecution against Mr. Sears, the murder charge was dismissed without prejudice after the conclusion of Mr. Sears's Georgia capital trial. Petitioner has never been adjudicated guilty of a homicide offense in any jurisdiction.

A. Death is a Disproportionately Severe Sentence for the Crime of Kidnaping with Bodily Injury

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Francis v. Resweber, 329 U.S. 459, 463 (1947).

The Eighth Amendment's protection against excessive or cruel and unusual punishments "flows from the basic precept of justice that punishment for [a] crime should be graduated and proportioned to [the] offense." *Atkins v. Virginia*, 536 U.S. 303, 311 (2003), *Roper v. Simmons*, 543 U.S. 551, (2005), citing *Weems v. United States*, 217 U.S. 349, 367 (1910). Consequently, this Court has disapproved the use of the death penalty in response to non-homicide offenses. *See e.g. Coker v. Georgia*, 433 U.S. 584 (1977) (death penalty excessive sentence for forcible rape); *Eberheart v. Georgia*, 433 U.S. 917 (1977) (death penalty excessive sentence for kidnaping and rape); *Enmund v. Florida*, 458 U.S. 782 (1982) (death penalty excessive for robbery conspirator who did not kill, attempt to kill or intend that deadly force be used by one of his co-conspirators). Most recently, in *Kennedy v. Louisiana*, 128 S.Ct. 2841 (2008), this Court concluded that even the brutal rape of a child is not sufficiently culpable behavior to justify application of the ultimate sanction. Thus, a sentence of death is not "proportioned and graduated" to the offense of the kidnaping with bodily injury of an adult woman.

It is clear that societal standards of decency have evolved to the point that there is a societal consensus against the imposition of the death penalty for kidnaping with bodily injury. *See Trop v. Dulles*, 536 U.S. 86, 100-101 (1958) (The Eighth Amendment must draw its meaning from the "evolving standards of decency which mark the progress of a maturing society.") Even in cases where a kidnaping resulted in the death of the victim, a death sentence is exceedingly rare, particularly where the defendant is *not* also simultaneously convicted of murder.

Though Georgia itself has explicitly approved the imposition of a death sentence for kidnaping, it appears from reported cases that Georgia has utilized that punishment in only four kidnaping cases since *Furman*, including Petitioner's. *Stanley v. State*, 240 Ga. 341, 241 S.E.2d 173 (1977); *Tucker v. State*, 245 Ga. 68, 263 S.E.2d 109 (1980); *Potts v. State*, 261 Ga. 716, 410 S.E.2d 89 (1991); *Sears*, 270 Ga. at 841. In each of the three other cases, the defendant was also contemporaneously tried and convicted of malice murder in the Superior Courts of Georgia. *Id.* Here, no jurisdiction has ever been required to prove each of the elements of capital murder against Petitioner beyond a reasonable doubt, nor to prove the requisite aggravating circumstances with respect to that murder offense. *See Potts*, 261 Ga. at 719 (in order to prove the offense of kidnaping with bodily injury, the state did *not* have to prove that Potts acted with malice and did *not* have to prove the death of the victim).

B. Petitioner's Sentence of Death for Kidnaping with Bodily Injury Is Arbitrary

Not only is Petitioner's sentence a disproportionate response to the crime for which he was convicted, his sentence is an anomaly, an isolated death sentence imposed among an enormous class of kidnaping offenders. For this reason as well, his death sentence cannot survive Eighth Amendment scrutiny. Petitioner is entitled to be sentenced in a manner consistent with the treatment of other kidnaping offenders: "[T]he State does not respect human dignity when, without reason, it inflicts upon some people a severe punishment that it does not inflict upon others. Indeed, the very words 'cruel and unusual punishments' imply a

condemnation of the arbitrary infliction of severe punishments." *Furman*, 408 U.S. at 274 (Brennan, J., concurring).

Here, the Georgia sentencing scheme wholly failed to narrow the class of death-eligible offenders as constitutionally required, resulting in Petitioner's arbitrarily imposed and disproportionately severe sentence. First, as stated *supra*, the State of Georgia was not required to prove the elements of malice murder and an aggravating circumstance pertaining thereto in order to obtain a sentence of death for Mr. Sears. Though jurors were instructed that they must conclude that Petitioner killed, attempted to kill or intended that deadly force be used in the crime, there has been no explicit jury finding that Petitioner possessed the requisite homicidal intent under *Enmund*, 458 U.S. at 797-798. Furthermore, because death is categorically and qualitatively different than all other types of punishment, this Court has repeatedly held that the commission of a murder alone is not sufficient to warrant the death penalty: "This most irrevocable of sanctions should be reserved for a small number of extreme cases." *Gregg*, 428 U.S. at 182. Thus, a sentencing scheme which narrows the class of *murderers* must be in place. Here, the jurors found aggravating circumstances with respect to the crime of kidnaping, not murder. The sentencing scheme failed in its initial duty to cull the death-eligible offenders to only that narrow class of offenses more horrid than others.

Second, the Georgia Supreme Court then failed in its duty ensure proportionality in the application of the death penalty on direct review. *See Walker*, 129 S.Ct. 453, 455 (2008) (Stevens, J., statement regarding the denial of certiorari)

(referring to Georgia's current proportionality review as "utterly perfunctory"). Pursuant to the sentencing scheme approved in *Gregg*, the Georgia Supreme Court is charged with the task of reviewing *every* death sentence imposed in the Superior Courts of the state. O.C.G.A. §§17-10-35. The Court is required to assure that "the death sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor" as well as to determine "whether the sentence of death is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." O.C.G.A. §§17-10-35(c)(1)-(3). Specifically, the Court must focus on "how prior sentencers have responded to acts similar to those committed by the defendant whose case is being reviewed" and to set aside death sentences that are out of line with sentences imposed for similar crimes. *Terrell v. State*, 276 Ga. 34, 40, 572 S.E.2d 595, 601 (2002). This review is part and parcel of the scheme approved in *Gregg* precisely because it safeguards against the risk that an aberrant death sentence will be imposed. *See Furman*, 408 U.S. at 274 (Brennan, J.), at 248 (Douglas, J.), and at 309 (Stewart, J.).

In Petitioner's case, this safeguard failed. After reaffirming that Georgia permits the death penalty for the crime of kidnaping with bodily injury, the Georgia Supreme Court concluded on direct review of Petitioner's sentence that the death penalty was not arbitrary applied to Mr. Sears. In support, the Court cited seven allegedly similar cases in which death sentences had been imposed. *Sears*, 270 Ga. at 845-846. In only three of those seven cases, *Stanley*, *Tucker*, and *Potts*, was the defendant sentenced to death for the crime of kidnaping with bodily injury. *Stanley*,

240 Ga. at 341; *Tucker*, 245 Ga. at 68; *Potts v. State*, 261 Ga. at 716. As stated above, in each of those cases, the defendants were also adjudicated guilty of murder in the Georgia courts and received a death sentence for murder as well as for kidnaping. Notably, in at least one of the cases cited by the Georgia Supreme Court, the defendant did not commit a kidnaping offense at all. *Moon v. State*, 258 Ga. 748, 375 S.E.2d 442 (1988). In reviewing Petitioner's sentence, the Court made no reference to the vast universe of kidnaping with bodily injury cases in which the defendant does not receive a death sentence. *See e.g. Walker v. Georgia*, 129 S.Ct. at 453 (Stevens, J.) (noting that an examination of all cases, including those in which the defendant did not receive death, was once a part of the Georgia Supreme Court's standard proportionality review in all death penalty cases, but that its review has since been constricted to a general effort to cite to other reported death penalty cases in which the crimes adjudicated bear some similarity to the case at bar). The Georgia Supreme Court simply did not perform the review necessary to insure that Petitioner's sentence of death was not "wanton" and "freakish" as expressly prohibited in *Furman*. The Habeas Court then failed to remedy this abdication of the Supreme Court's duty to ensure proportionate sentences in holding that Petitioner's Eighth Amendment claim was *res judicata*. Thus, this Court should grant the Writ in order to relieve Petitioner of his arbitrary and disproportionate sentence of death.

CONCLUSION

For the foregoing reasons, the Writ should be granted.

Dated, this the 27th day of January, 2010.

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OPPOSITION BRIEF

ORIGINAL

ORIGINAL

Supreme Court, US
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IN THE SUPREME COURT OF THE UNITED STATES

DEMARCUS ALI SEARS,

PETITIONER,

v.

STEVEN UPTON, WARDEN,
GEORGIA DIAGNOSTIC AND CLASSIFICATION PRISON,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE GEORGIA SUPREME COURT

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT

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QUESTIONS PRESENTED

I. SHOULD THIS COURT DENY PETITIONER'S REQUEST FOR CERTIORARI REVIEW WHEN THE STATE HABEAS COURT'S DENIAL OF PETITIONER'S INEFFECTIVENESS CLAIM IS IN DIRECT ACCORDANCE WITH THIS COURT'S HOLDINGS IN STRICKLAND V. WASHINGTON, 466 U.S. 668 (1984) AND ITS PROGENY?

II. SHOULD THIS COURT DENY PETITIONER'S REQUEST FOR CERTIORARI REVIEW WHEN THE CLAIM HE IS ASKING THIS COURT TO REVIEW WAS NOT RAISED IN THE STATE COURT BELOW?

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BRIEF IN OPPOSITION
ON BEHALF OF RESPONDENT

PART ONE

STATEMENT OF THE CASE

Petitioner, Demarcus Ali Sears, was convicted by a jury of kidnapping with bodily injury and armed robbery on September 22, 1993, and was sentenced to death for the kidnapping with bodily injury and life in prison for the armed robbery on September 25, 1993. The Georgia Supreme Court affirmed Petitioner's conviction on December 3, 1997, but remanded the case for further development of the record with regard to potential jury misconduct during the sentencing phase. Sears v. State, 268 Ga. 759, 493 S.E.2d 180 (1997). On March 15, 1999, the Georgia Supreme Court found that the jury issues did not violate Petitioner's constitutional rights and affirmed the imposition of the death sentence. Sears v. State, 270 Ga. 834, 514 S.E.2d 426 (1999). Petitioner's petition for writ of certiorari was denied by this Court on October 12, 1999. Sears v. Georgia, 528 U.S. 934 (1999), *rehn'g denied,* 528 U.S. 1040 (1999).

On January 13, 2000, Petitioner filed for state habeas relief. An evidentiary hearing was held on January 19, 2006. Following the filing of post-hearing briefs by the parties, the state habeas court denied Petitioner's petition for a writ of habeas corpus on January 7, 2008. Utilizing the standards of

Strickland v. Washington, 466 U.S. 668 (1984), the state habeas court rejected Petitioner's ineffective assistance of counsel claim for failing to satisfy this Court's prejudice requirement.

On September 28, 2009, the Georgia Supreme Court denied Petitioner's Application for Certificate of Probable Cause to appeal the denial of habeas corpus relief. On January 27, 2010, Petitioner filed a petition for writ of certiorari in this Court seeking. This opposition for writ of certiorari follows.

DENIAL OF SPECIFIC "FACTS" SET OUT IN PETITION

Respondent denies and the record refutes certain portions of Petitioner's "Statement of the Case" as they are highly argumentative, skewed in favor of the Petitioner and in many instances, wholly inaccurate.

Specifically, Petitioner contends trial counsel, Julian Treadaway, recognized Petitioner had "odd and inappropriate" behavior and as a result should have had Petitioner evaluated by a medical expert. Petitioner, however, ignores Mr. Treadaway's explanation that the oddness he noticed in Petitioner was Petitioner's effort to portray himself as a gangster rapper. Moreover, trial counsel Ray Gary specifically testified that if Petitioner's family "had indicated that there was something wrong with [Petitioner], [counsel] might have leaned toward an evaluation or something. ... [but] according to his daddy, he was just downright mean." Trial counsel testified that they found that there was no "red flag" or "exceedingly erratic behavior," which indicated that Petitioner needed to be evaluated. Trial counsel noted that Petitioner was able to pay attention, communicate, and understand his counsel's role throughout the trial.

Petitioner also misrepresents trial counsel's penalty phase investigation alleging that counsel spent only a half a day developing mitigation evidence. The record establishes that, as

soon as trial counsel was appointed, Mr. Treadaway asked Petitioner for background family history, social history, and the like. Counsel obtained a life history from Petitioner's mother and requested Petitioner's school records.[1] In addition, trial counsel personally met with Petitioner's family and spoke with them on the telephone *several times*. Trial counsel also traveled for a week to Kentucky and Ohio where they privately interviewed numerous family members, family friends, and Petitioner's guidance counsel. Mr. Treadaway specifically testified that the defense team interviewed the family or discussed the case with them "more than once, more than on this occasion" in Kentucky.

In addition to interviewing family and friends for mitigation, trial counsel also spoke with attorneys and police in Kentucky about Petitioner's past criminal troubles and attempted to speak with police in Ohio, but they refused to be interviewed.

Petitioner also claims that trial counsel only wanted witnesses who would "say something good about [Petitioner]," but as the record actually reflects, trial counsel asked witnesses

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[1] Although the state habeas court found trial counsel did not obtain Petitioner's school records, the habeas court relied on the absence of copies of the records in trial counsel's files at the time of the state habeas hearing. However, Petitioner presented no evidence or testimony to indicate trial counsel did not receive these records prior to trial.

about Petitioner's background, mental health, his family life, his relationship, his involvement (or lack thereof) with drugs or violence, and the emotional impact that his potential execution could have on his family.

The witnesses, prior to trial, described Petitioner as "very, very intelligent," "independent," "the most outgoing and easy person - real friendly, courteous," "just a nice kid," "polite," great with kids, babysat his twin sisters, "good brother," "typical" teenager, "a comedian [who] always had everybody laughing," "an honest boy," had no sign of a temper, got along fine with his family, did not do drugs, did not carry around knives, did not seem like he would kidnap, rape or murder someone. The witnesses further reported that they "[had] no idea that [Petitioner] would ever be involved in or do anything like this," "never thought he was capable of that sort of thing," were shocked when they heard about the crime, and that Petitioner must have been "at the wrong place at the wrong time." Counsel also were told that Petitioner's family was a good family, that they were "decent people" and "caring people ... who have invested as far as I can tell, a lot in the well being of their children," and that Petitioner was close with his siblings and had normal sibling rivalry, "never complained about his father," and had an "excellent and open relationship" with his mother.

The record also shows that trial counsel were told that Petitioner had seen a psychologist because he was "bored with school" and wanted to make money in the music business, that Petitioner was "engrossed in his own self," that he was in the Severe Behavioral Handicap Program at school because "he did not seem able to stay on task all the time" and because he was misbehaving in class and distracting the other students, that he had moved out of parents' house and quit school for a short time, and that he was a "bit of a loner."

Petitioner references two interviewees who stated that they had encouraged Petitioner to seek psychiatric help. However, Petitioner leaves out other statements by interviewees, such as Betty Cornett, a residential specialist for severely retarded adults, who said she did not feel Petitioner needed any psychiatric treatment. Ms. Cornett also stated that Petitioner was a "normal teenager" and his only problem was that he "goofed around a lot in school." Anna McKinney, a psychiatric nurse and family friend who spoke with someone in the Sears' household almost daily, reported she did not think anything was usual about Petitioner.

Furthermore, Petitioner contends one juror was "mocked, insulted and shunned by her fellow jurors" into voting for capital punishment. However, the Georgia Supreme Court, after the case was remanded for further development of the record with

regard to potential jury misconduct, found "it is clear [the juror] voted for the death penalty because she felt pressed to do so only as a result of the 'normal dynamic of jury deliberations.'" Sears v. State, 270 Ga. 834, 837 (1999), citing Jenkins v. U.S., 380 U.S. 445, 446 (1965) (emphasis added).

Further, Petitioner claims the jury likely would not have recommended a death sentence if evidence of Petitioner's "history of neglect, physical, sexual, and emotional abuse" had been revealed. However, these allegations of abuse are unsubstantiated and could not have been presented to a jury. For example, the affidavit testimony by Petitioner's relatives suggesting Petitioner was sexually abused contain only hearsay and speculation, which could not have been introduced during Petitioner's trial because the hearsay rule is not suspended during the penalty phase. Trial counsel did, however, call Evelyn Mercer, Petitioner's high school guidance counselor, to testify about Petitioner's behavior problems. Ms. Mercer stated that Petitioner had a learning disability and was placed in a severe behavior handicap class for his self-destructive behavior.

Furthermore, Petitioner's explanation of neurologist Dr. Tony Strickland's testimony at the state habeas proceeding provides an inaccurate portrayal of Petitioner's mental

condition. Dr. Strickland's claim that Petitioner suffers from frontal lobe damage is based on affidavits of individuals who had a vested interest in Petitioner's case and were never personally interviewed by Dr. Strickland. The affiants, who stated Petitioner had several childhood accidents which led to his frontal lobe damage, were relatives of Petitioner and Dr. Strickland found no hospital reports, medical evaluations, or brain lesions to corroborate these reports or his diagnosis. In addition, Dr. Strickland relies on Petitioner's self-report of drug use, and testified that had Petitioner refrained from using drugs his deficits would have subsided.

Likewise, Petitioner misconstrues psychiatrist Richard Dudley's testimony during the state habeas hearing and his medical diagnosis. Dr. Dudley based his diagnosis on uncorroborated family reports of childhood abuse and his personal interview of Petitioner. Dr. Dudley testified Petitioner was unwilling to discuss the facts of the case and often made false statements, but nonetheless Dr. Dudley relied on this interview to support his finding that Petitioner suffered abuse. The record establishes that there were no medical records, police reports, or direct evidence Petitioner did indeed suffer any such abuse.

STATEMENT OF THE FACTS

The facts of Petitioner's crimes, as summarized in the direct appeal opinion of the Georgia Supreme Court, are as follows:

> The evidence showed that on the afternoon of October 7, 1990, Demarcus Sears and Phillip Williams were walking through Atlanta because their car had broken down. Wanting to return home to Ohio, where they lived, they walked to a Waffle House in Smyrna and tried to borrow money from several patrons in the restaurant. They told the patrons that their car had broken down and they needed money to go to Cincinnati. Sears carried a black briefcase that contained brass knuckles, knives and a set of old handcuffs that was missing a key. He opened the briefcase in the restaurant and tried to sell some of the items to a customer. After receiving directions and a couple of dollars for bus fare, Sears and Williams walked to a nearby Kroger food store. A police officer observed them loitering near the Kroger parking lot and briefly spoke with them before he left in response to a radio call. Subsequently, they decided to steal a car so they could drive back to Cincinnati.
>
> They spotted the victim, Gloria Wilbur, when she parked her 1985 Buick and entered the Kroger. Around 8:00 p.m., Ms. Wilbur returned to her car and placed her groceries in the trunk. Sears approached her, struck her with the brass knuckles and forced her into the car. Williams then got behind the wheel and they drove north on I-75. Sears told Ms. Wilbur to keep quiet, pulled her into the back seat, and handcuffed her with her hands behind her back. When they stopped for gas and hamburgers, Sears wedged Ms. Wilbur down between the seats and covered her with book bags to prevent discovery. While they were driving through Tennessee, he raped her.
>
> They crossed the border into Kentucky around 1:00 a.m. and stopped the car. Despite her pleas to remain in the car, Sears took the victim into the bushes along I-75 and stabbed her to death. Ms. Wilbur's body was

found, still handcuffed, almost a week later. Her abandoned Buick was discovered in a Cincinnati suburb. Bloodstains in the car matched the victim and pubic hair taken from the back seat matched Sears.

Based on an identification by witnesses at the Waffle House and a tip from an Ohio informant, the police questioned Williams and Sears. Both men gave statements. Sears admitted that he had taken the Buick and kidnapped, raped and killed the victim. His statement matched Williams' statement, except that Sears claimed that it was Williams who had struck Ms. Wilbur with the brass knuckles and Williams claimed that it was Sears. Both men stated that only Sears had raped and stabbed her. Sears also consented to a search of his mother's house, where he lived, and was escorted by police to this residence. He took the police to his room and showed them the black briefcase and brass knuckles. Williams pled guilty in exchange for two life sentences and testified for the state at Sears' trial.

Sears v. State, 268 Ga. 759, 759-760 (1997).

PART TWO

REASONS FOR NOT GRANTING THE WRIT

I. THE STATE HABEAS COURT'S PROPER APPLICATION OF STRICKLAND V. WASHINGTON IN REJECTING PETITIONER'S TRIAL COUNSEL INEFFECTIVENESS CLAIM PRESENTS NO ISSUE WARRANTING THIS COURT'S EXERCISE OF ITS CERTIORARI JURISDICTION.

Contrary to Petitioner's allegation, a review of the state habeas court's decision clearly demonstrates that the state court properly utilized this Court's well-established standard promulgated in Strickland v. Washington, 466 U.S. 668 (1984), in rejecting Petitioner's trial counsel ineffectiveness claim. Petitioner's mere disagreement with the result of the state habeas court's proper application of Strickland does not present a question warranting this Court's exercise of its certiorari jurisdiction.

The state habeas court properly applied the Strickland standard in determining that Petitioner had failed to establish prejudice based on trial counsel's investigation and presentation during the penalty phase of Petitioner's trial. The record reflects that the state habeas court utilized this Court's standards regarding prejudice as laid out in the seminal cases of Strickland, 466 U.S. 668 (1984), and Wiggins v. Smith, 539 U.S. 510 (2003). In direct accordance with Strickland, the state habeas court held that "if deficient performance is shown, then the Petitioner must establish that the results of the

proceeding would have been different, but for the deficient performance." (Final Order, p. 25). Further relying on the Strickland prejudice analysis, the state habeas court explained that "the question is whether there is a reasonable probability that, absent the errors," there would have been a different outcome. (Final Order, p. 25). Thereafter, state habeas court specifically found that Petitioner "failed to establish a likelihood that the outcome of his trial would have been different if his counsel had done more investigation." (Final Order, pp. 29-30). This prejudice analysis is in direct accordance with this Court's holding in Strickland.

Further, in addition to citing to Strickland and Wiggins, the state habeas court referenced this Court's analysis from Williams v. Taylor, 529 U.S. 362 (2002) and Lockhart v. Fretwell, 506 U.S. 364 (1993). Moreover, the state habeas court referenced Smith v. Francis, 253 Ga. 782, 325 S.E.2d 362 (1985), a Georgia Supreme Court case reiterating Georgia's adoption of Strickland's "reasonable probability" standard for determining if a petitioner has suffered prejudice. Smith, 253 Ga. at 783 (proving prejudice requires a defendant to show there is a reasonable probability that, but for counsel's deficiency, the result would have been different). Therefore, the state habeas court did not create a new standard for determining prejudice

but rather applied the law as laid out by this Court and adopted by the Georgia Supreme Court.

In finding that Petitioner had failed to establish prejudice, the state habeas court held that Petitioner's case was distinguishable from those cases where trial counsel had presented "little or no mitigation evidence." (Final Order, p. 30). The state habeas court concluded:

> Here, although counsel failed to investigate thoroughly, they did develop a reasonable mitigation theory with evidence to support it. Because counsel put forth a reasonable theory with supporting evidence, Petitioner has failed to meet his burden of proving that there is a reasonable likelihood that the outcome at trial would have been different if a different mitigation theory had been advanced.

(Final Order, p. 30).

Contrary to Petitioner's argument that the state habeas court presumed "any mitigation case is sufficient to avoid a finding of prejudice," the record shows that trial counsel made a reasonable strategic decision in presenting the mitigation theory they presented. Trial counsel determined, after speaking with Petitioner's family and friends, that they would present a mitigation theory that Petitioner "had not had any significant problems with the law previous to this occasion, that he was, of course, a young man, that his parents were well-thought-of members of their community, that there were people who cared for him, and that this act was out of character," as well as a

theory that tried to put the blame on Phillip Williams and emphasized Petitioner's youth, cooperation, and the adverse impact a death sentence would have on his family. This was a reasonable and well-developed mitigation theory that was based on the evidence provided to counsel by Petitioner himself and by his family, friends and guidance counselor prior to trial. Furthermore, the six mitigation witnesses called by Petitioner's counsel testified to the jury in support of this mitigation theory.

Moreover, the record shows that trial counsel made a reasonable, strategic decision not to have Petitioner evaluated or further investigate mental health. Both attorneys explicitly testified that they understood that Sabel v. State, 248 Ga. 10, 282 S.E.2d 61 (1981), which was established state law at the time of Petitioner's trial, would have required them to turn over their expert's name and report to the prosecution. Mr. Treadaway stated that "based on Sabel and ... discussions of the effect of Sabel with the trial judge ... it felt like it could actually be harmful to proceed with a psychological examination...." Mr. Gary and Mr. Treadaway testified that they understood that Petitioner could very well make statements to the expert which could be used against him at trial. Mr. Gary testified that they feared that, in light of Sabel, having

Petitioner evaluated could hurt his case more than help it - both in the guilt-innocence phase and the sentencing phase.

Further, the record shows that Petitioner's counsel, in their ardent representation of him, tried to get around the legal restrictions of Sabel. The defense filed a motion to preclude the State from interviewing and calling as witnesses defense experts that the defense had determined not to use. Further, trial counsel filed a motion to have Petitioner evaluated after the guilt-innocence phase but prior to the penalty phase so as to prevent Petitioner's own damaging statements being used against him. The trial court complied with Sabel and denied the motion to bar the State from calling a non-testifying defense expert, which confirmed to Mr. Treadaway that there would be a risk that Petitioner's statements to the expert could be used against him in trial and for that reason, defense counsel chose to withdraw their motion for funds for an psychological expert.

In addition to the strategic decision not to have an expert evaluate Petitioner due to the potentially harmful ramifications under the existing rules of Sabel, Petitioner's counsel also testified that did not believe, after interacting with Petitioner and speaking with his family and friends, that Petitioner had any mental health problems.

The state habeas court properly utilized Strickland's prejudice analysis in denying Petitioner's petition. Petitioner merely disagrees with the fact-specific application of Strickland. However, this Court has repeatedly stated, "We do not grant … certiorari to review evidence and discuss specific facts." United States v. Johnson, 268 U.S. 220, 227 (1925). See also, Texas v. Mead, 465 U.S. 1041 (1984).

Accordingly, as the state habeas court properly applied Strickland in denying Petitioner's claim of ineffective assistance of counsel, this case presents no issue warranting certiorari review.

II. THIS COURT SHOULD DECLINE TO GRANT CERTIORARI TO REVIEW A CLAIM THAT WAS NOT RAISED IN THE STATE COURT BELOW.

Petitioner asserts that this Court should grant the instant petition to review his claim that the imposition of the sentence of death for kidnapping with bodily injury resulting in the death of the victim is cruel and unusual punishment.[2] As Petitioner did not raise this claim in the state habeas proceedings below, this case does not present the proper vehicle for review of the claim. Further, pretermitting the fact that the issue was not raised below, Petitioner's sentence for kidnapping with bodily injury does not conflict with the laws of this Court.

[2] Those cases cited in support by Petitioner all concern cases in which there was no homicide.

A. Claim Was Not Raised In The State Court Below

Petitioner did not raise this claim in the state habeas proceedings below. Accordingly, this case does not present the proper vehicle for Petitioner to attempt to raise this new allegation. See Banks v. California, 395 U.S. 708 (1969)(finding that where Petitioner did not ask the Supreme Court of California to review the judgment entered by the Court of Appeals, the decision of the Court of Appeal is not a "final judgment … rendered by the highest court of a State in which a decision could be had.." and this Court lacked jurisdiction to review it.); see also Cardinale v. Louisiana, 394 U.S. 437 (1969); Hammerstein v. California, 341 U.S. 491 (1951). Therefore, this Court should deny Petitioner's request for certiorari review.

B. No Conflict With The Precedent Of This Court.[3]

Further, pretermitting the fact that Petitioner did not raise this claim in the state habeas proceedings, Respondent submits that the Petitioner's sentence of death for the offense of kidnapping with bodily injury resulting in the death of the victim is in accordance with the settled precedent of this Court approving Georgia's capital sentencing scheme and allowing the

[3] Respondent also notes that Petitioner Sears previously raised this claim to this Court in applying for certiorari review from the direct appeal of his conviction and sentence. Sears v. Georgia, 528 U.S. 934 (1999).

exercise of Georgia's sovereign power to punish the offense of kidnapping with bodily injury where the victim dies. Therefore, this Court should decline to grant certiorari to review the instant claim.

Georgia's statutory death penalty scheme authorizing the imposition of the death penalty for the offense of kidnapping with bodily injury where the victim is killed in the course of the kidnapping is constitutional pursuant to the rationale of this Court in Coker v. Georgia, 433 U.S. 584 (1977). In Coker, following a review of Georgia's capital punishment statute in its entirety, this Court held that the death penalty is "an excessive penalty for the rapist who ... does not take human life." Id. at 597. This holding implies that the death penalty may be imposed upon a person who commits the offense of kidnapping with bodily injury resulting in the deliberate killing of the victim. See Coker at 599. This proposition is further evidenced by this Court's denial of the petition for a writ of certiorari in Potts v. Georgia, 505 U.S. 1224 (1992) (defendant could be sentenced to death in Cobb County, Georgia for the offense of kidnapping with bodily injury resulting in the victim's death where the victim was killed in Forsyth County, Georgia).

The State of Georgia's authority to enact a statutory death penalty scheme that permits the imposition of the death penalty

for the offense of kidnapping with bodily injury that results in the victim's death regardless of where the murder was committed, as in the instant case, is derived from its sovereign power. See Heath v. Jones, 941 F.2d 1126 (11th Cir. 1991) (defendant could be sentenced to death in Alabama for the offense of murder during a kidnapping despite the fact that the murder took place in Georgia). See also, Potts v. Georgia, supra.

As this Court stated in Heath v. Alabama, 474 U.S. 82, 92 (1985):

> The Constitution leaves in the possession of each State ... 'certain exclusive and very important portions of sovereign power'. (quoting The Federalist No. 9, p. 55 (J. Cooke ed. 1961)). Foremost among the prerogatives of sovereignty is the power to create and enforce a criminal code. To deny a State the power to enforce its criminal laws ... 'would be a shocking and untoward deprivation of the historic right and obligation of the States to maintain peace and order within their confines.' (quoting Bartkus v. Illinois, 359 U.S. 121,137 (1959)).

As a result, Respondent submits that Petitioner's sentence of death for the offense of kidnapping with bodily injury resulting in the death of the victim is in accordance with the principles of State sovereignty repeatedly expounded by this Court. Therefore, this Court should decline to exercise its certiorari jurisdiction to review the instant petition.

CONCLUSION

WHEREFORE, for all the above and foregoing reasons, Respondent prays that this Court deny the instant petition for a writ of certiorari seeking review of the decision of the Georgia Supreme Court denying federal habeas corpus relief to Petitioner as to his claims of ineffective assistance of counsel.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION

Respondent certifies that the instant brief is typed in 12 point Courier New, and contains 3,972 words as determined by the word-processing system used to prepare the brief.

CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the within and foregoing pleading, prior to filing the same, by depositing a copy thereof in the United States Mail, properly addressed upon:

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This 18th day of February, 2010.

BETH A. BURTON
Senior Assistant Attorney General

REPLY BRIEF

ORIGINAL

ORIGINAL

Supreme Court, U.S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

09-8854

No. 09-A-590

DEMARCUS A. SEARS,

Petitioner,

Versus,

STEVEN UPTON, Warden.

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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DEMARCUS SEARS,

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Respondent.

REPLY BRIEF IN SUPPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

Petitioner, DEMARCUS ALI SEARS, respectfully submits this reply brief in support of his Petition for Writ of Certiorari to review the judgment of the Supreme Court of Georgia, denying review of a final judgment rendered by the Superior Court of Butts County, Georgia (hereinafter Habeas Court).

Respondent's Brief in Opposition to Certiorari (hereinafter "R. Br.") flatly concedes that the Habeas Court applied the "outcome determinative" standard of prejudice rejected many times by this Court. Respondent then further concedes that an unconstitutional procedural rule impeded the representation of Petitioner's trial counsel and prevented them from developing the crucial mental health evidence adduced in the Habeas Court

below, yet not considered by that court as a result of its application of the erroneous standard.

As a preliminary matter, Respondent devotes much of his brief to matters not relevant to the Petition. Respondent's brief lists tasks purportedly completed by trial counsel as part of their representation[1] (R. Br. at 3-6, 13-15), attempting to misdirect this Court from the detailed findings of fact and law made by the Habeas Court with respect to trial counsel's deficient performance. (See Order[2] at 27-29). Similarly, Respondent claims that the evidence of Mr. Sears's troubled background and brain impairment adduced at the habeas corpus evidentiary hearing is "unsubstantiated and could not have been presented to a jury" and that the findings of his mental health experts are inaccurate.[3] (R. Br. at 7-8). However, the Habeas Court's

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[1] Throughout his Brief in Opposition, Respondent makes numerous scattered assertions and quotations without record references, some of which are flatly wrong and others grossly out of context. The detailed references to the record contained in Mr. Sears's Petition and the Appendix to the Petition present a reliable summary of the material evidence of record.

[2] The Final Order of the Habeas Court was reprinted as Appendix B to Mr. Sears's original Petition.

[3] Respondent did not substantially refute the mitigation evidence of which he now complains, despite having the opportunity to do so in the habeas court. For example, Respondent complains that testimony from Petitioner's relatives that he was sexually abused is "hearsay and speculation." (R. Br. at 7). Mr. Sears's older brother, Demetrius, specifically testified that he had direct knowledge of Petitioner's sexual abuse at the hands of an older male family member because he directly observed some instances of abuse and was aware of other instances at the time they were happening. (P.Ex. 26, HT 1681-1682) Respondent did not depose Demetrius Sears, or any of the other witnesses who testified to the facts concerning Petitioner's abuse, and did not offer any testimony in rebuttal. To the extent that Respondent did make efforts to develop evidence rebutting Petitioner's mitigating evidence, they failed *See e.g.* P. Ex. 34(b), HT 1736-1737 (correspondence from one of Petitioner's former teachers who offered testimony regarding Mr. Sears's deficits and educational background to counsel for Respondent in which she rebukes Respondent's attempts to undermine her testimony).

analysis does not rest on the relative strength or weakness of Petitioner's newly adduced mitigating evidence. Instead, the Habeas Court's ruling rests upon the erroneous legal conclusion that Petitioner should be denied relief because his trial counsel presented a "reasonable" mitigation case and it was *not possible* to know how a jury would react to a different mitigation case. (Order at 30).

When these distractions are ignored and Respondent's argument on the issue at hand – the erroneous prejudice standard – is examined, Respondent's Brief only serves to highlight the deep flaw in the lower court's analysis. .

A. RESPONDENT'S ARGUMENTS AFFIRM THAT THE GEORGIA HABEAS COURT FAILED TO APPLY THE PROPER STANDARD UNDER *STRICKLAND V. WASHINGTON*, 466 U.S. 688 (1984) AND ITS PROGENY

Respondent asserts that "[in] direct accordance with *Strickland*, the state habeas court held that 'if deficient performance is shown, then the Petitioner must establish that the results of the proceeding would have been different, but for the deficient performance.'" (R. Br. at 11-12, citing Order at 25). Respondent is wrong; this is not the *Strickland* standard. In fact, *Strickland* rejects an "outcome-determinative standard" as "not quite appropriate." 466 U.S. 688, 693-94. This Court has repeatedly held that a habeas petitioner need show only a reasonable probability of a different outcome in order to satisfy Strickland's second prong. *Strickland*, 466 U.S. at

694; *Wiggins*, 539 U.S. 510, 534 (2003), *Rompilla v. Beard*, 545 U.S. 374, 393 (2005); *Porter v. McCollum*, 558 U.S at ___, 130 S.Ct. 447, 455-456 (2009).

Strickland requires a habeas court to consider the materiality and probative value of evidence that was missing as a result of counsel's deficient performance, precisely the key inquiry that was never undertaken by any Georgia court. "[T]he appropriate test for prejudice finds its roots in the test for materiality of exculpatory information...a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 693-694. As Respondent's brief highlights, the Habeas Court did not apply this standard.

Instead, the Habeas Court applied the "outcome-determinative test" specifically disavowed by this Court. The court then held that because trial counsel had presented a "reasonable" mitigation case centered around Petitioner's youth and purported normalcy, Petitioner could not satisfy this heightened standard. (Order at 29). In contrast, *Strickland* did not stop after simply examining the reasonableness of the case which was presented, but considered what the newly presented evidence would have added. The *Strickland* Court then addressed and weighed the new evidence, finding in that case that the new evidence was merely cumulative and would "barely

have altered the sentencing profile." 466 U.S. at 700. That is simply not the case here.

Because the Georgia courts applied the wrong legal standard, no court has ever assessed what impact the evidence of Petitioner's mental impairments and the evidence of his chaotic and abusive upbringing may have had on his sentencing jurors. Respondent's admission that the Georgia courts deciding Mr. Sears's case applied a prejudice standard expressly rejected by *Strickland* supports granting the Writ in order to make the promise of *Gregg v. Georgia*, 428 U.S. 153, 193, 197 (1976), that fair and individualized consideration will be given to mitigating evidence in capital cases, a reality.

B. RESPONDENT'S ARGUMENTS REGARDING THE APPLICATION OF THE UNFAIR PROCEDURAL RULE ANNOUNCED IN *SABEL V. STATE*, 248 GA. 10, 282 S.E.2D 61 (1981), FURTHER HIGHLIGHT THE FLAW IN THE GEORGIA COURT'S HOLDING

Respondent's arguments with respect to the operation of *Sabel v. State*, 248 Ga. 10, 282 S.E.2d 61 (1981), also highlight the flaw in the Habeas Court's ruling. At the time of Petitioner's trial, *Sabel v. State* prohibited indigent defendants from obtaining the assistance of a qualified expert without waiving the confidentiality of his counsel's independent investigation and the right to be free from self-incrimination. In other words, if appointed defense counsel sought the assistance of an expert at State expense, that expert's conclusions and reports would be available to the prosecution and

could be used against the defendant, even if the expert was not called as a defense witness. Following Petitioner's trial, the Georgia Supreme Court held that application of this rule was fundamentally unfair. *Rower v. State*, 264 Ga. 323, 443 S.E.2d 839 (1994). Respondent argues that given the operation of *Sabel*, Petitioner's trial counsel made a "reasonable strategic decision" not to pursue their motion for an independent mental health evaluation of Petitioner. (R. Br. at 14-15).

As an initial matter, the Habeas Court's holding rejects that argument. The court below found that counsel's decision not to seek a mental health evaluation constituted deficient performance, concluding that:

> [N]o reasonable lawyer would terminate his investigation for mitigation evidence in a death penalty case where their [*sic*] client is acting in a bizarre manner, without exploring fully the possible reasons. Sabel was certainly an obstacle here, but counsel, due to their limited investigation, were unable to properly evaluate the risk of going forward with the evaluation.

(Order at 29).

Yet in arguing that trial counsel was dissuaded from pursuing mental health mitigation evidence specifically because of the strictures of *Sabel*, Respondent makes two crucial admissions. (R. Br. at 15). First, Respondent necessarily concedes that trial counsel were aware that their client may have had a mental defect yet did not commission the requisite evaluation.

Second, in so arguing, Respondent concedes that the application of an unconstitutional procedural rule compromised counsel's decision-making. Respondent specifically states that trial counsel tried, yet was unable, to get around the onerous requirements of *Sabel*. (R. Br. at 15). Given that the rule was, as found by the Georgia Supreme Court, fundamentally unfair, then regardless of whether counsel chose to pursue or chose to withdraw the motion, the decision they made would have been unreasonable. The unfair impact of the *Sabel* rule is yet another component of trial counsel's deficient performance. As this Court recognized in *Strickland*, the "[g]overnment violates the right to effective assistance [of counsel] when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense." 466 U.S. at 686 (citations omitted). That Mr. Sears's representation was additionally compromised by *Sabel* only reinforces the importance of applying the appropriate "reasonable probability" standard for prejudice. When a capital defendant is not provided the representation required by the Constitution, there is an "absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower." 466 U.S. at 6[illegible].

In sum, given the many deficiencies in trial counsel's representation found by the Habeas Court, some of which are flatly conceded by Respondent,

the application of an incorrect standard of prejudice is particularly egregious. The failure of the Georgia courts to address the substantial mental health mitigation evidence that could have been presented had Petitioner been afforded a fair trial necessitates this Court's granting of the Writ. Petitioner respectfully requests that this Court require the courts of Georgia to apply the proper standard to determine the prejudice resulting from capital trial counsel's failures and thereby ensure the constitutionality of Georgia death sentences.

C. PETITIONER'S CLAIM THAT HIS DEATH SENTENCE VIOLATES THE EIGHTH AMENDMENT PROHIBITION ON CRUEL AND UNUSUAL PUNISHMENT WAS PROPERLY RAISED IN THE STATE COURTS

Respondent alleges that this Court may not reach the second question presented by the Petition, that his death sentence for kidnaping with bodily injury is disproportionate, excessive and arbitrary, because it was not presented to the state courts below. (R Br. at 17). However, the claim was presented to the Habeas Court as Claims X and XIII of the Amended Petition, and found to be *res judicata* by the Habeas Court. (Order at 6-7). This finding was disputed by Petitioner in his Application for a Certificate of Probable Cause to Appeal to the Supreme Court of Georgia. (CPC Application at 77).[4] Mr. Sears's may therefore seek review of his Eighth Amendment claims by this Court.

[4] The Application for Certificate of Probable Cause appears as Appendix D to the original Petition

CONCLUSION

For the foregoing reasons, as well as those reasons presented in his Petition for Writ of Certiorari to the Supreme Court of Georgia, Petitioner Demarcus Sears respectfully requests that this Court grant the Writ.

DATED, this the 26th day of February, 2010.

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ORDER

SUPREME COURT OF GEORGIA

Case No. S08E1253 Atlanta, September 28, 2009

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

DEMARCUS A. SEARS v. HILTON HALL, WARDEN

From the Superior Court of Butts County.

Upon consideration of the Application for Certificate of Probable Cause to appeal the denial of habeas corpus, it is ordered that it be hereby denied.

2000V27

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia.
Witness my signature and the seal of said court hereto affixed the day and year last above written.

SUPREME COURT OF THE STATE OF GEORGIA 1845

Pamela M. Smith, Deputy Clerk.

IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

DEMARCUS ALI SEARS
Petitioner,

v.

HILTON HALL, Warden,
Georgia Diagnostic and
Classification Prison,

Respondent.

CASE NO 2000-V-27

PETITION FOR WRIT
OF HABEAS CORPUS

FINAL ORDER
FINDINGS OF FACT AND CONCLUSIONS OF LAW
PURSUANT TO O.C.G.A. § 9-14-49

COMES NOW before the court Petitioner's Amended Petition for Writ of Habeas Corpus as to his conviction and sentence in the Superior Court of Cobb County. Having considered Petitioner's original and Amended Petition for Writ of Habeas Corpus (the "Amended Petition"), the Respondent's Answer and Amended Answer, relevant portions of the appellate record, evidence admitted at the hearing on this matter on January 19, 2006, the arguments of counsel and the post-hearing briefs, this Court makes the following findings of fact and conclusions of law as required by O.C.G.A. § 9-14-49 and denies the petition for writ of habeas corpus as to the conviction and sentence.

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I. PROCEDURAL HISTORY

A. Proceedings in the Superior Court of Cobb County

Petitioner, Demarcus Ali Sears, was convicted by a jury of kidnapping with bodily injury and armed robbery on September 22, 1993. The victim as to both counts was Gloria Wilbur He was sentenced to death for the kidnapping with bodily injury and life in prison for the armed robbery on September 25, 1993

On direct appeal, the Georgia Supreme Court summarized the facts underlying Petitioner's convictions and sentences as follows:

> The evidence showed that on the afternoon of October 7, 1990, Demarcus Sears and Phillip Williams were walking through Atlanta because their car had broken down. Wanting to return home to Ohio, where they lived, they walked to a Waffle House in Smyrna and tried to borrow money from several patrons in the restaurant. They told the patrons that their car had broken down and they needed money to go to Cincinnati. Sears carried a black briefcase that contained brass knuckles, knives and a set of old handcuffs that was missing a key. He opened the briefcase in the restaurant and tried to sell some of the items to a customer. After receiving directions and a couple of dollars for bus fare, Sears and Williams walked to a nearby Kroger food store. A police officer observed them loitering near the Kroger parking lot and briefly spoke with them before he left in response to a radio call. Subsequently, they decided to steal a car so they could drive back to Cincinnati.
>
> They spotted the victim, Gloria Wilbur, when she parked her 1985 Buick and entered the Kroger. Around 8:00 p.m., Ms. Wilbur returned to her car and placed her groceries in the trunk. Sears approached her, struck her with the brass knuckles and forced her into the car. Williams then got behind the wheel and they drove north on I-75 Sears told Ms. Wilbur to keep quiet, pulled her into the back seat, and handcuffed her with her hands behind her back. When they stopped for gas and hamburgers, Sears wedged Ms. Wilbur down between the seats and covered her with book bags to

> prevent discovery While they were driving through Tennessee, he raped her
>
> They crossed the border into Kentucky around 1:00 a.m. and stopped the car Despite her pleas to remain in the car, Sears took the victim into the bushes along I-75 and stabbed her to death. Ms. Wilbur's body was found, still handcuffed, almost a week later. Her abandoned Buick was discovered in a Cincinnati suburb Bloodstains in the car matched the victim and pubic hair taken from the back seat matched Sears.
>
> Based on an identification by witnesses at the Waffle House and a tip from an Ohio informant, the police questioned Williams and Sears. Both men gave statements. Sears admitted that he had taken the Buick and kidnapped, raped and killed the victim. His statement matched Williams' statement, except that Sears claimed that it was Williams who had struck Ms. Wilbur with the brass knuckles and Williams claimed that it was Sears. Both men stated that only Sears had raped and stabbed her. Sears also consented to a search of his mother's house, where he lived, and was escorted by police to this residence. He took the police to his room and showed them the black briefcase and brass knuckles. Williams pled guilty in exchange for two life sentences and testified for the state at Sears' trial

Sears, 268 Ga. at 759-60.

Petitioner's motion for new trial was denied on July 18, 1996. Petitioner filed his notice of appeal on August 19, 1996.

B. Proceedings in the Georgia Supreme Court

The Georgia Supreme Court affirmed Petitioner's conviction on December 3, 1997, but remanded the case for further development of the record with regard to potential jury misconduct during the sentencing phase. Sears v. State, 268 Ga. 759 (1997). On March 15, 1999, the Georgia Supreme Court found that the jury issues did not violate Petitioner's constitutional rights and affirmed the imposition of the death sentence. Sears v. State, 270 Ga. 834 (1999)

C. Proceedings in the United States Supreme Court

Petitioner's petition for writ of certiorari was denied by the United States Supreme Court on October 12, 1999 Sears v. Georgia, 528 U.S. 934 (1999), *rehn'g denied*, 528 U.S. 1040 (1999)

D. Instant Habeas Petition in the Butts County Superior Court

On January 13, 2000, Petitioner filed the above-styled habeas corpus petition. Original habeas counsel died shortly before the first motions hearing. Subsequent counsel was disbarred Third counsel entered the case after a lengthy delay and new motions were filed. An evidentiary hearing was held on January 19, 2006.

II. SUMMARY OF RULINGS ON PETITIONER'S CLAIMS FOR HABEAS CORPUS RELIEF

Petitioner's Amended Petition enumerates thirty-eight claims for relief. As is stated in further detail below, this Court finds: (1) some claims asserted by Petitioner are procedurally barred due to the fact that they were litigated on direct appeal; (2) some claims are procedurally defaulted, as Petitioner failed to timely raise the alleged errors and failed to satisfy the cause and prejudice test or the miscarriage of justice exception; (3) some claims are non-cognizable; and (4) some claims are neither procedurally barred nor procedurally defaulted and are therefore properly before this Court for habeas review. [1]

Petitioner addressed five claims in his posthearing brief: constitutional errors including ineffective assistance of counsel resulting from the application of Sabel v. State to Petitioner's case; ineffective assistance of counsel for failing to investigate and to present mitigating evidence. unconstitutionality of death sentence because of evolving standards of decency;

[1] In making its findings, the Court has used the numbering of Petitioner's claims as found in Petitioner's amended Petition when possible.

suppression of evidence concerning his co-defendant in violation of Brady v. Maryland, and cumulative error. To the extent Petitioner has not briefed his claims and has not presented evidence regarding his claims, the claims are deemed abandoned and are accordingly denied.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW[2]

A. CLAIMS THAT ARE BARRED AS RES JUDICATA

Some of Petitioner's claims were rejected by the Georgia Supreme Court on interim appeal in Sears v. State , 262 Ga. 805 (1993) or direct appeal in Sears v State, 268 Ga. 759 (1997) and Sears v. State, 270 Ga 834 (1999) Georgia law is clear that issues that have been raised and litigated on direct appeal may not be relitigated by means of a habeas corpus proceeding. Elrod v. Ault, 231 Ga. 750, 204 S.E.2d 176 (1974); Gunter v. Hickman, 256 Ga. 315, 348 S.E.2d 644 (1986); Roulain v Martin, 266 Ga. 353, 466 S.E.2d 837 (1996). Accordingly, this Court is precluded from reviewing the following claims that were raised and litigated on direct appeal:

a) **Claim I,** wherein Petitioner alleges that his right to due process, equal protection, a fair trial, effective assistance of counsel, to present a defense, and to a reliable determination of punishment, pursuant to the United States and Georgia constitutions were violated by the application of the rule of Sabel v. State, 248 Ga. 10, 282 S.E.2d 61 (1981). To the extent this claim refers to Petitioner's challenge that the trial court's ruling required him to reveal the identity of his expert witnesses and their written reports as a violation of Georgia Supreme court's decision in Rower v. State, this claim was addressed and decided

[2] After careful consideration of the objections of both parties to the evidence offered by the other, the objections of both Respondent and Petitioner are overruled. The exhibits of both parties are admitted. The Court has weighed the evidence offered by both parties and has given it the appropriate legal and factual consideration in light of the objections.

adversely to Petitioner on direct appeal and is therefore *res judicata*. Sears v State, 268 Ga. at 760-761 (2). To the extent this claim raises issues other than ineffective assistance of counsel not addressed by the Georgia Supreme Court on direct appeal, it is procedurally defaulted;

b) **Claim II**, wherein Petitioner alleges that the trial court violated Petitioner's constitutional rights by failing to provide Petitioner with the necessary assistance of competent and independent mental health experts, was addressed and decided adversely to Petitioner on interim and direct appeal and therefore is *res judicata*. Sears v. State, 262 at 807(5) and Sears v. State, 270 Ga. at 845(9). However, to the extent this claim raises any other issues not addressed by the Georgia Supreme Court on direct appeal, it is procedurally defaulted;

c) **That portion of Claim IV**, wherein Petitioner alleges that the concealment of material evidence and false testimony presented by the State violated Petitioner's constitutional rights when during the penalty phase of trial the prosecution team presented testimony that Petitioner was the "worst" prisoner the Cobb County jail had ever seen, testimony supported by administrative violations and records of Petitioner behaving poorly, was addressed and decided adversely to Petitioner on direct appeal. Sears v. State, 270 Ga. at 842(5);

d) **Claim V**, wherein Petitioner alleges that the failure of the court to require disclosure of the criminal records and pending charges concerning the state's witnesses violated Petitioner's constitutional rights. To the extent this claim refers to the denial of Petitioner's motion to compel the state to provide the juvenile records for Phillip Williams, this claim was addressed and decided adversely to Petitioner on direct appeal, and therefore is *res judicata*. Sears v. State, 268 Ga. at 761-762(3). However, to the extent that this claim is intended to include additional information regarding Williams or state witnesses not complained about on direct appeal or any other evidentiary issues not raised and/or addressed by the Georgia Supreme Court on direct appeal, this claim is procedurally defaulted,

e) **Claim X**, wherein Petitioner alleges that his sentence of death is disproportionate when compared to others who have committed similar crimes, was addressed and decided adversely to Petitioner on direct appeal. Sears v. State, 270 Ga. at 845-846(12);

f) **That portion of Claim XIII**, wherein Petitioner alleges that his death sentence was sought and imposed arbitrarily and disparately, was addressed and decided adversely to Petitioner on direct appeal. Sears v. State, 270 Ga. at 845-846(10);

g) **Claim XIV**, wherein Petitioner alleges that he was denied his right to a fair trial in violation of the United States and Georgia Constitutions because the trial judge did not recuse herself from Petitioner's case, was addressed and decided adversely to Petitioner on interim appeal. Sears v. State, 262 Ga. at 805-806(1),

h) **That portion of Claim XV**, wherein Petitioner alleges the pools from which Petitioner's grand jury was drawn underrepresented cognizable groups in the community, was addressed and decided adversely to Petitioner on interim appeal. Sears v. State, 262 Ga at 806(2). To the extent this claim is referring to other cognizable groups except those complained about on interim appeal and/or was not addressed on interim appeal by the Georgia Supreme Court, this claim is procedurally defaulted and may not be addressed on its merits in this proceeding absent a showing of cause and actual prejudice or of a miscarriage of justice to overcome the procedural default;

i) **Claim XVIII**, wherein Petitioner alleges that the trial court violated Petitioner's constitutional rights by excusing for cause certain unspecified jurors whose views on the death penalty were not extreme enough to warrant exclusion under Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770(1968), was addressed and decided adversely to Petitioner on direct appeal. Sears v. State, 268 Ga. at 763(7). To the extent this claim is intended to include other jurors not complained about and/or was not addressed by the Georgia Supreme Court on direct appeal, this claim is procedurally defaulted and may not be addressed on its merits in this proceeding absent a showing of cause and actual prejudice or of a miscarriage of justice to overcome the procedural default;

j) **Claim XIX**, wherein Petitioner alleges that the trial court violated Petitioner's constitutional rights by improperly permitting the State to exercise its peremptory strikes in violation of Batson v. Kentucky, 476 U.S. 79 (1986) and J.E.B. v. Alabama, 511 U.S. 127(1994), was addressed and decided adversely to Petitioner on direct appeal. Sears v State, 268 Ga. at 763-764(8) and (9) To the extent this claim is intended to include other jurors not complained about and/or was not addressed by the Georgia Supreme Court on direct appeal, this claim is procedurally defaulted and may not be addressed on its merits in this proceeding absent a showing of cause and actual prejudice or of a miscarriage of justice to overcome the procedural default;

k) **Claim XX**, wherein Petitioner alleges that the trial court judge violated Petitioner's constitutional right to a fair trial by not removing jurors for cause or bias, either because they were clearly biased against Petitioner directly, or because they were incapable of giving proper consideration to a sentence other than death and/or to mitigating evidence, was address and decided adversely to Petitioner on direct appeal. Sears v. State, 268 Ga. at 763(6). To the extent this claim is intended to include other jurors not complained about and/or was not addressed by the Georgia Supreme Court on direct appeal, this claim is

procedurally defaulted and may not be addressed on its merits in this proceeding absent a showing of cause and actual prejudice or of a miscarriage of justice to overcome the procedural default,

l) **That portion of XXI**, wherein Petitioner alleges that the jury pools from which Petitioner's grand jury was drawn was unconstitutionally composed, was addressed and decided adversely to Petitioner on interim appeal. Sears v. State, 262 Ga. at 806(2),

m) **That portion of Claim XXIII**, wherein Petitioner alleges that the prosecution and/or its agents, officials, assigns, and employees including but not limited to all personnel, both current and those personnel employed as of October, 1990, and at any intervening time period, in the Cobb County's District Attorney's office, Cobb County Police Department, all other police departments and/or sheriff's departments in the greater Atlanta metropolitan area, and the Georgia Bureau of Investigation, failed to disclose relevant, material exculpatory files, materials, information, documents, and/or evidence, during all phases of the pre-trial, trial, and appellate proceedings, was addressed and decided adversely to Petitioner on direct appeal. Sears v. State, 268 Ga. at 761-762(3). To the extent this claim does not refer to Phillip Williams' juvenile records, this claim is procedurally defaulted and may not be addressed on its merits in this proceeding absent a showing of cause and actual prejudice or of a miscarriage of justice to overcome the procedural default;

n) **That portion of Claim XXIII**, wherein Petitioner alleges prosecutorial misconduct in that was constitutionally improper for the prosecution to comment on the defendant's (Petitioner's) failure to waive his privilege against self-incrimination, either when arrested or during trial, was addressed and decided adversely to Petitioner on direct appeal. Sears v. State, 268 Ga. at 765-766(15) and Sears v. State, 270 Ga. at 845(8). To the extent this claim was not addressed by the Georgia Supreme Court on direct appeal, this claim is procedurally defaulted and may not be addressed on its merits in this proceeding absent a showing of cause and actual prejudice or of a miscarriage of justice to overcome the procedural default;

o) **That portion of Claim XXIII**, wherein Petitioner alleges prosecutorial misconduct in that the prosecution's closing argument also contained comments that denigrated the jurors' right to exercise mercy, as well an alleged unsubstantiated argument on deterrence and references to other illegitimate subjects, including that Petitioner is a danger to kill again if the death penalty is not imposed, was addressed and decided adversely to Petitioner on direct appeal. Sears v. State, 268 Ga. at 765-766(15) and Sears v. State, 270 Ga. at 845(8). To the extent this claim was not addressed by the Georgia Supreme Court on direct appeal, this claim is procedurally defaulted and may not be addressed on its merits in this proceeding absent a showing of cause and actual prejudice or of a miscarriage of justice to overcome the procedural default;

p) **That portion of Claim XXIII**, wherein Petitioner alleges prosecutorial misconduct when the prosecutor allegedly argued facts not in evidence and improperly offered his own personal opinion about the evidence and proper outcome, was addressed and decided adversely to Petitioner on direct appeal Sears v. State, 268 Ga. at 765-766(15) and Sears v. State, 270 Ga. at 845(8). To the extent this claim was not addressed by the Georgia Supreme Court on direct appeal, this claim is procedurally defaulted and may not be addressed on its merits in this proceeding absent a showing of cause and actual prejudice or of a miscarriage of justice to overcome the procedural default;

q) **That portion of Claim XXIV**, wherein Petitioner alleges that the prosecutor suppressed material exculpatory evidence, was decided and addressed adversely to Petitioner on direct appeal. Sears v. State, 268 Ga at 761-762(3) To the extent this claim does not refer to Phillip Williams' juvenile records, this claim is procedurally defaulted and may not be addressed on its merits in this proceeding absent a showing of cause and actual prejudice or of a miscarriage of justice to overcome the procedural default,

r) **That portion of Claim XXVI**, wherein Petitioner alleges that the search of his parent's house, and all the evidence gathered from such search was illegal and in violation of Petitioner's constitutional rights because:

1) Petitioner's consent was not freely and voluntarily given because Petitioner was under the influence of mind-altering drugs, and Petitioner was unfairly coerced by police investigators, and investigators improperly and illegally used false promises to entice Petitioner to provide his consent.

2) Petitioner did not have authority to provide consent for any search of his parents' home because he did not own, and no longer lived at, the property;

This claim was addressed and decided adversely to Petitioner on direct appeal. Sears v. State, 268 Ga. at 762-763(4);

s) **That portion of Claim XXVIII**, wherein Petitioner alleges the trial court refused to suppress Petitioner's statements made to the police interrogators without being Mirandized, without giving a knowing, voluntary and intelligent waiver of his rights, and even after he allegedly repeated asked for an attorney, was addressed and decided adversely to Petitioner on direct appeal. Sears v. State, 262 Ga. at 807(4) and Sears v. State, 268 Ga. 763(5);

t) **That portion of Claim XXVIII**, wherein Petitioner alleges that the trial court erred in permitting to compose a jury that was "death qualified" because the State of Georgia did not have jurisdiction to prosecute the case as a death penalty case, was addressed and decided adversely to Petitioner on direct appeal. Sears v. State, 268 Ga. at 764(10);

u) **That portion of Claim XXVIII**, wherein Petitioner alleges that the trial court failed to give proper, appropriate and necessary instructions requested by defense counsel and required for a trial that comports with due process, was addressed and decided adversely to Petitioner on direct appeal. Sears v State, 268 Ga at 766(16)(a)(b). To the extent this claim was not addressed by the Georgia Supreme Court on direct appeal, this claim is procedurally defaulted and may not be addressed on its merits in this proceeding absent a showing of cause and actual prejudice or of a miscarriage of justice to overcome the procedural default;

v) **That portion of Claim XXVIII**, wherein Petitioner alleges that the trial court erred in denying Petitioner's request to charge the jury on the lesser-included offense of kidnapping, was addressed and decided adversely to Petitioner on direct appeal. Sears v State, 268 Ga. at 766(16)(a);

w) **That portion of Claim XXVIII**, wherein Petitioner alleges that the trial court erred by refusing to charge the jury on the lesser included offense of simple kidnapping because the indictment required the prosecution to prove beyond a reasonable doubt that the beating with brass knuckles and the stabbing of the victim in order to sustain a conviction, was addressed and decided adversely to Petitioner on direct appeal. Sears v. State, 268 Ga. at 766(16)(a) To the extent this claim was not addressed by the Georgia Supreme Court on direct appeal, this claim is procedurally defaulted and may not be addressed on its merits in this proceeding absent a showing of cause and actual prejudice or of a miscarriage of justice to overcome the procedural default;

x) **That portion of Claim XXVIII**, wherein Petitioner alleges that the trial court erred in failing to charge the kidnapping is not a continuing offense under Georgia law, was addressed and decided adversely to Petitioner on direct appeal Sears v. State, 268 Ga. at 766(16)(b);

y) **That portion of Claim XXVIII**, wherein Petitioner alleges that the trial court's erroneous failure to charge that kidnapping with bodily injury had to have caused the victim's death risked a fatal variance between the indictment and the verdict, was addressed and decided adversely to Petitioner on direct appeal. Sears v. State, 268 Ga. at 766(16)(b);

z) **That portion of Claim XXVIII**, wherein Petitioner alleges that the trial court erred in charging the jury on the crime of conspiracy and impermissibly lowered the State's burden of proof because the indictment of Petitioner did not allege conspiracy, which was a merged and unchargeable crime of the complete crimes of armed robbery and kidnapping with bodily injury, was addressed and decided adversely to Petitioner on direct appeal. Sears v. State, 268 Ga. at 766(16)(b);

aa) **That portion of Claim XXVIII**, wherein Petitioner alleges that the trial court erroneously failed to charge the jury on rape evidence already allegedly improperly admitted into evidence, was addressed and decided adversely to Petitioner on direct appeal Sears v. State, 268 Ga. at 766(16)(b);

bb) **That portion of Claim XXVIII**, wherein Petitioner alleges that the trial court erred in admitting evidence of rape because Georgia's res gestae exception only permits the admission of other crimes evidence when that evidence is probative of the charge crime, and the rape evidence was not probative of the crimes charged in the indictment because the rape in Tennessee was not apart of the res gestae and because evidence of the independent crime was highly prejudicial, was addressed and decided adversely to Petitioner on direct appeal. Sears v. State, 268 Ga. at 764(11);

cc) **That portion of Claim XXVIII**, wherein Petitioner alleges that the prosecution exhorted the jury to convict Petitioner in order to punish him for rape, a crime with which he had not been allegedly charged, was addressed and decided adversely to Petitioner on direct appeal. Sears v. State, 268 Ga. at 764(11). To the extent this claim was not addressed by the Georgia Supreme Court on direct appeal, this claim is procedurally defaulted and may not be addressed on its merits in this proceeding absent a showing of cause and actual prejudice or of a miscarriage of justice to overcome the procedural default;

dd) **That portion of Claim XXVIII**, wherein Petitioner alleges that the trial court erred in admitting inadmissible character evidence by Georgia Bureau of Investigation Agent McCravy because he lacked personal knowledge of the facts in his testimony, was addressed and decided adversely to Petitioner on direct appeal. Sears v State, 268 Ga. at 764(12);

dd) **That portion of Claim XXVIII**, wherein Petitioner alleges that the trial court erred by admitting inadmissible hearsay by a number of witnesses throughout the guilt/innocence phase of the trial, thereby allegedly tainting the entire trial proceedings and process, was addressed and decided adversely to Petitioner on direct appeal. Sears v State, 268 Ga. at 765(13) To the extent this claim was not addressed by the Georgia Supreme Court on direct appeal, this claim is procedurally defaulted and may not be addressed on its merits in this proceeding absent a showing of cause and actual prejudice or of a miscarriage of justice to overcome procedural default;

ee) **That portion of Claim XXVIII**, wherein Petitioner alleges that the trial court erred in admitting the transcript of Petitioner's statement to investigators because the statement was not properly authenticated, was addressed and decided adversely to Petitioner on interim and direct appeal. Sears v State, 262 Ga at 807(4) and Sears v. State, 268 Ga. at 763(5);

ff) **That portion of Claim XXVIII**, wherein Petitioner alleges that the trial court erred in admitting prejudicial photographs depicting the victim's body, was addressed and decided adversely to Petitioner on direct appeal Sears v. State, 268 Ga. at 765(14);

gg) **That portion of Claim XXVIII**, wherein Petitioner alleges that the trial court erroneously denied Petitioner's motion in limine and refused to suppressed evidence seized, was addressed and decided adversely to Petitioner on interim appeal. Sears v. State, 262 Ga. at 806-807(3);

hh) **That portion of Claim XXVIII**, wherein Petitioner alleges that the trial court erred in ruling that the identities, reports, findings and/or opinions of experts who evaluated Petitioner, but who did not testify on Petitioner's behalf were discoverable by the prosecution, was addressed and decided adversely to Petitioner on direct appeal. Sears v. State, 268 Ga. at 760-761(2);

ii) **That portion of Claim XXVIII**, wherein Petitioner alleges that the trial erred in denying Petitioner's pretrial motion for the criminal records history, and/or pending charges of co-defendant Phillip Williams, was addressed and decidedly adversely to Petitioner on direct appeal. Sears v. State, 268 Ga. at 761-762(3);

jj) **Claim XXIX**, wherein Petitioner alleges that the introduction of prejudicial and inflammatory evidence at trial violated Petitioner's constitutional rights when the trial court erred in admitting bloody and prejudicial photographs taken of the crime scene and of the victim, including during and post-autopsy photographs, was addressed and decided adversely to Petitioner on direct appeal. Sears v. State, 268 Ga. at 765(14);

kk) **That portion of Claim XXX**, wherein Petitioner alleges trial court error during the penalty phase of Petitioner's trial in that the trial court denied Petitioner his right to present evidence of possible psychiatric disorder in mitigation by denying, without an opportunity to make a showing or proffer as to the relevancy or need of such evidence, was addressed and decided adversely to Petitioner on interim and direct appeal. Sears v. State, 262 Ga. at 807(5) and Sears v. State, 270 Ga. at 845(9);

ll) **That portion of Claim XXX**, wherein Petitioner alleges that the trial court on nine separate occasions referred to the crime for which Petitioner was facing the death penalty as "murder" rather than "kidnapping," and, therefore allegedly coerced the jury's verdict, was addressed and decided adversely to Petitioner on direct appeal Sears v. State, 270 Ga. at 844(7)(c);

mm) **That portion of Claim XXX**, wherein Petitioner alleges that the trial court erroneously repeated its errant instructions to the jury under O.C.G.A. § 17-10-30(b)(2), and at no time during the penalty phase instructed the jury that it could vote to impose a sentence of death only if it unanimously found beyond a

reasonable doubt that Petitioner killed, attempted to kill, or intended to kill, was addressed and decided adversely to Petitioner on direct appeal. Sears v. State, 270 Ga. at 843(7)(a).

nn) **That portion of Claim XXX**, wherein Petitioner alleges that the trial court erroneously failed to instruct the jury on the constitutional threshold requirement that the jury first find beyond a reasonable doubt that Petitioner committed murder prior to imposing the death penalty, was addressed and decided adversely to Petitioner on direct appeal. Sears v. State, 270 Ga at 843(7)(a);

oo) **That portion of Claim XXX**, wherein the trial court erroneously failed to properly explain the unanimity requirement for aggravating circumstances and the lack of unanimity requirement for mitigating circumstances and Mills v. Maryland, 486 U.S. 367(1988), was addressed and decided adversely to Petitioner on direct appeal. Sears v. State, 270 Ga. at 844-845(7)(e);

pp) **That portion of Claim XXX**, wherein in Petitioner alleges the trial court erred in defining the crime of rape for the jury in violation of O.C.G.A. §§ 16-6-1, 17-10-30(b)(2), was addressed and decided adversely to Petitioner on direct appeal. Sears v. State, 270 Ga. at 845(7)(f);

qq) **That portion of Claim XXX**, wherein Petitioner alleges the trial court's instructions and the jury's finding as to the O.C.G.A. § 17-10-30(b)(7) aggravating circumstance was improper because:

1) the jury's finding of the § 17-10-30(b)(7) aggravating circumstance was error in that each of the elements was found in the disjunctive; and

2) the trial court's denial of Petitioner's motion to quash the § 17-10-30(b)(7) aggravating circumstance because the defense had not been notified of its planned use was error;

These claims were addressed and decided adversely to Petitioner on direct appeal. Sears v. State, 270 Ga. at 842-842(6)(a)(b);

rr) **That portion of Claim XXX**, wherein Petitioner alleges that the trial court erred in admitting impermissible opinion and character evidence at the sentencing, was addressed and decided adversely to Petitioner on direct appeal. Sears v. State, 270 Ga. at 842(5). To the extent these claims were not addressed on direct appeal by the Georgia Supreme Court, these claims are procedurally defaulted and may not be addressed on its merits in this proceeding absent a showing of cause and actual prejudice or of a miscarriage of justice to overcome the procedural default;

ss) **That portion of Claim XXX**, wherein Petitioner alleges that the trial court erred in admitting hearsay, was addressed and decided adversely to Petitioner on direct appeal. Sears v. State, 268 Ga. at 765(13) To the extent this claim was not

addressed on direct appeal by the Georgia Supreme Court, this claim is procedurally defaulted and may not be addressed on its merits in this proceeding absent a showing of cause and actual prejudice or of a miscarriage of justice to overcome the procedural default,

tt) **That portion of Claim XXX**, wherein Petitioner alleges that the trial court erred by erroneously denying Petitioner's objections to the trial court's repeated instructions and/or charges to the jury during the sentencing phase, including the three charges given by the trial court pursuant to Allen v. United States, 164 U.S. 492(1896) and Romine v. State, 256 Ga. 521 (1986), was addressed and decided adversely to Petitioner on direct appeal. Sears v. State, 270 Ga. at 835-839(1),

uu) **That portion of Claim XXX**, wherein Petitioner alleges that the trial court erred in recharging the jury during the sentencing phase by singling out one juror by name, who felt she was being intimidated by the jury foreman, was addressed and decided adversely to Petitioner on direct appeal Sears v. State, 270 Ga. at 835-839(1);

vv) **Claim XXXI**, wherein Petitioner alleges that his constitutional rights were violated when the trial court denied Petitioner his right to resent evidence of possible psychiatric disorder in mitigation by restricting his right to a mental health expert at the penalty phase of Petitioner's trial, was decided and addressed adversely to Petitioner on interim and direct appeal. Sears v. State, 262 Ga. at 805(5) and Sears v. State, 270 Ga at 845(9) To the extent that this claim was not addressed by the Georgia Supreme Court on direct appeal, this claim is procedurally defaulted and may not be addressed on its merits in this proceeding absent a showing of cause and actual prejudice or of a miscarriage of justice to overcome the procedural default;

ww) **Claim XXXIV**, wherein Petitioner alleges that the trial court failed to instruct the jury that unanimity was not required to impose a life sentence, was decided and addressed adversely toPetitioner on direct appeal. Sears v. State, 270 Ga. at 844 (7)(e)(i);

xx) **That portion of Claim XXXVI**, wherein Petitioner alleges that the jurors and/or venire persons and/or alternate jurors committed repeated acts of misconduct throughout the jury selection process, and continuing through all phases of the pre-trial, trial, jury deliberations at trial, and even post-trial proceedings, both inside and outside the courthouse, in that they:

1) allegedly tainted and/or affected by and/or relied upon outside, extraneous and/or unlawful influences, facts, factors, sources of fact and/or law, persons, officials, etc ; and

2) allegedly referred to and/or consultedand/or relied upon any and all such outside, extraneous and/or unlawful influences, facts, factors, sources of act and/or law, persons, officials, etc , were addressed and decided adversely;

These claims were addressed and decidedly adversely to Petitioner on direct appeal Sears v. State, 270 Ga. at 840-841(3)(a) and (b). To the extent these claims are referring to claims relative to other jurors that were not raised on direct appeal and/or were not addressed by the Georgia Supreme Court on direct appeal, these claims are procedurally defaulted and may not be addressed on its merits in this proceeding absent a showing of cause and actual prejudice or of a miscarriage of justice to overcome the procedural default; and

yy) **That portion of Claim XXXVI**, wherein Petitioner alleges that his constitutional rights were violated by juror misconduct when jurors and/or venire persons and/or alternate jurors allegedly testified falsely during jury selection, and/or failed to reveal relevant and material information during voir dire and on the jury questionnaires, and during other portions of the pretrial, trial, jury deliberations at trial, and post-trial proceedings, when they were questioned by the parties and/or by the judge, was decided and addressed adversely to Petitioner on direct appeal. Sears v. State, 270 at 839-840(2). To the extent that this claim is referring to claims relative to other jurors that were not raised on direct appeal and/or were not addressed by the Georgia Supreme Court on direct appeal, this claim is procedurally defaulted and may not be addressed on its merits in this proceeding absent a showing of cause and actual prejudice or of a miscarriage of justice to overcome the procedural default.

B. CLAIMS THAT ARE PROCEDURALLY DEFAULTED

Claims Petitioner failed to raise on direct appeal are procedurally defaulted absent a showing of cause and actual prejudice, except where their review is necessary to avoid a miscarriage of justice and substantial denial of constitutional rights. See Black v. Hardin, 255 Ga 239, 336 S.E.2d 754 (1985); Valenzuela v. Newsome, 253 Ga. 793, 325 S.E.2d 370 (1985); O.C.G.A. § 9-14-48 (d); White v. Kelso, 261 Ga. 32, 401 S.E.2d 733 (1991). Petitioner's failure to enumerate alleged errors at trial or on appeal operates as a waiver and bars consideration of

those errors in habeas corpus proceedings See Harp v Angel, 257 Ga. 333, 357 S.E.2d 596 (1987); Black v Hardin, 255 Ga. 239, 336 S E.2d 754 (1985); Valenzuela v Newsome, 253 Ga 793, 325 S E 2d 370 (1985). See also Zant v. Gaddis, 247 Ga 717, 279 S.E.2d 219 (1981) (holding that ineffective assistance of counsel can constitute cause under O.C.G.A § 9-14-48(d)). Turpin v Todd, 268 Ga. 820, 493 S.E.2d 900 (1997)(A procedural bar to habeas corpus review may be overcome if Petitioner shows adequate cause for failing to raise an issue at trial or on direct appeal and actual prejudice resulting from the alleged error or errors A habeas petitioner who meets both prongs of the standard enunciated in Strickland v. Washington, 466 U.S. 668 (1984), has established cause and prejudice sufficient to overcome the procedural bar of O.C.G.A. § 9-14-48(d)).

The following grounds for habeas relief, which were not raised by Petitioner at trial or on direct appeal, have been procedurally defaulted The Court is barred from considering any of these claims on their merits due to the fact that Petitioner has failed to demonstrate cause and prejudice, or a fundamental miscarriage of justice sufficient to excuse his failure to raise these grounds:

a) **Claim III**, wherein Petitioner alleges that his constitutional rights were violated by the post-trial denial of funds to retain a psychologist. To the extent this claim is referring to the trial court's denial of Petitioner's pretrial motion for a psychiatric evaluation between the guilt innocence and sentencing phases of the trial, this claim is barred by the doctrine of *res judicata*. Sears v. State, 270 Ga. at 845(9);

b) **That portion of Claim IV**, wherein Petitioner alleges that the concealment of material evidence and false testimony presented by the State, in particularly the testimony of Phillip Williams, violated Petitioner's constitutional rights;

c) **Claim XI**, wherein Petitioner alleges that he was tried while incompetent;

d) **Claim XII**, wherein Petitioner alleges that his disabilities and mental illnesses, are the functional, moral, legal and constitutional equivalent of a

person who is mentally retarded, and as such his execution would be unconstitutional;

e) **That portion of claim XIII**, wherein Petitioner alleges that the lack of uniform standard for seeking the death penalty across Georgia and the arbitrary abuse of discretion inherent in the prosecution's decision to seek the death penalty renders his death sentence unconstitutional;

f) **That portion of Claim XV**, wherein Petitioner alleges that his grand jury and grand jury foreman were discriminatorily selected To the extent this claim is referring to whether the grand jury list represented a fair cross-section of the community, this claim is barred by the doctrine of *res judiciata*. Sears v State, 262 Ga. at 806 (2),

g) **Claim XVI**, wherein Petitioner alleges that the grand jury which returned the indictment against Petitioner engaged in misconduct and was subject to undue influence in violation of Petitioner's United States and Georgia constitutional rights and but for this grand jury misconduct, the outcome would have been different at all stages of the pre-trial, trial, post-trial and appellate proceedings;

h) **Claim XVII**, wherein Petitioner alleges that the trial court's restrictions on voir dire deprived Petitioner of his constitutional rights;

i) **That portion of Claim XXI**, wherein Petitioner alleges that his traverse jury pools from which Petitioner's traverse jury was drawn was unconstitutionally composed;

j) **That portion of Claim XXI**, wherein Petitioner alleges that the jury commission that selected the jury pools was unlawfully and unconstitutionally comprised;

k) **That portion of Claim XXI**, wherein Petitioner alleges that he was denied his constitutional right to a fair and impartial jury throughout all stages of his pre-trial, trial, post-trial and appellate proceedings and that but for such denial the outcome would have been different at all stages of the pre-trial, trial, post-trial and appellate proceedings;

l) **That portion of Claim XXI**, wherein Petitioner alleges that the grand jury indictment was invalid due to:

   1) the Cobb County jury commission was unconstitutionally composed in that it excluded African Americans, Hispanics, Asians, Native Americans, women, poor people, young adults ages 18-30 and older citizens from jury service, which resulted in unconstitutional exclusionary procedures and practices of the Cobb County jury commission;

2) O.C.G A. § 15-12-40, which governs the compilation of the grand jury and traverse jury lists is allegedly unconstitutional;

3) racial discrimination in the selection of the grand jury forepersons.

4) the inclusion of personally biased grand jurors;

5) the inclusion of grand jurors prejudiced by pervasive and prejudicial pretrial publicity;

6) the prosecution's failure to present to the grand jury exculpatory and impeaching evidence in its possession;

7) the jury commission which selected Petitioner's traverse jury was unlawfully and unconstitutionally comprised in violation of O.C G.A § 15-12-20, and

8) the grand jury and original traverse jury were unconstitutionally composed, were the result of alleged unconstitutional practices and procedures, and allegedly consequently denied Petitioner his Georgia and United States Constitutional rights;

m) **Claim XXII**, wherein Petitioner alleges that the trial court erred in requiring the jurors to take an oath by swearing on the Bible and committing to a true verdict pursuant to the dictates of God;

n) **That portion of Claim XXIII**, wherein Petitioner alleges that the prosecution and/or its agents, officials, assigns, and employees including but not limited to all personnel, both current and those personnel employed as of October, 1990, and at any intervening time period, in the Cobb County's District Attorney's office, Cobb County Police Department, Cobb County Sheriff's Department, all other police departments and/or sheriff's departments in the greater Atlanta metropolitan area, and the Georgia Bureau of Investigation, engaged in repeated acts of misconduct throughout all phases of Petitioner's trial by failing to disclose relevant, material exculpatory files, materials, documents, information and/or evidence, regarding acts of misconduct by members of the jury venire, actual jurors, and/or the alternate jurors;

o) **That portion of Claim XXIII**, wherein Petitioner alleges that the prosecution and/or its agents, officials, assigns, and employees including but not limited to all personnel, both current and those personnel employed as of October, 1990, and at any intervening time period, in the Cobb County's District Attorney's office, Cobb County Police Department, Cobb County Sheriff's Department, all other police departments and/or sheriff's departments in the greater Atlanta

metropolitan area, and the Georgia Bureau of Investigation, engaged in repeated acts of misconduct throughout all phases of Petitioner's trial by failing to disclose relevant, material exculpatory files, materials, documents, information and/or evidence, regarding acts of misconduct by the trial court and/or its officials, employees, agents and/or assigns;

p) **That portion of Claim XXIII**, wherein Petitioner alleges that the prosecution and/or its agents, officials, assigns, and employees including but not limited to all personnel, both current and those personnel employed as of October, 1990, and at any intervening time period, in the Cobb County's District Attorney's office, Cobb County Police Department, Cobb County Sheriff's Department, all other police departments and/or sheriff's departments in the greater Atlanta metropolitan area, and the Georgia Bureau of Investigation, knowingly relied upon perjured testimony, which testimony was false and said prosecution knew and/or had reason to believe and/or should have known that such testimony was false;

q) **That portion of Claim XXIII**, wherein Petitioner alleges that the prosecution and/or its agents, officials, assigns, and employees including but not limited to all personnel, both current and those personnel employed as of October, 1990, and at any intervening time period, in the Cobb County's District Attorney's office, Cobb County Police Department, Cobb County Sheriff's Department, all other police departments and/or sheriff's departments in the greater Atlanta metropolitan area, and the Georgia Bureau of Investigation knowingly presented and relied upon testimony in which witnesses falsely testified about any possible deals, benefits, proceeds, or other inducements they had received, expected to receive, and/or did in fact receive in exchange for such testimony;

r) **That portion of Claim XXIII**, wherein Petitioner alleges that the prosecution and/or its agents, officials, assigns, and employees including but not limited to all personnel, both current and those personnel employed as of October, 1990, and at any intervening time period, in the Cobb County's District Attorney's office, Cobb County Police Department, Cobb County Sheriff's Department, all other police departments and/or sheriff's departments in the greater Atlanta metropolitan area, the Clayton County District Attorney, the Clayton County Sheriff and Police Department, the Georgia Bureau of Investigation, the Cobb County Medical Examiner's Office, elicited improper or false testimony and made improper arguments to the jury. To the extent this claim refers to the prosecutor's alleged improper closing arguments during the guilt-innocence and sentencing phases of trial, this claim was addressed and decided adversely to Petitioner on direct appeal to the Georgia Supreme Court, and is therefore barred by the doctrine of

res judicata Sears v. State, 268 at 765-766(15) and Sears v. State, 270 at 845(8);

s) **That portion of Claim XXIII**, wherein Petitioner alleges that the prosecution and/or its agents, officials, assigns, and employees including but not limited to all personnel, both current and those personnel employed as of October, 1990, and at any intervening time period, in the Cobb County's District Attorney's office, Cobb County Police Department, Cobb County Sheriff's Department, all other police departments and/or sheriff's departments in the greater Atlanta metropolitan area, and the Georgia Bureau of Investigation, allegedly allowed its witnesses to convey a false impression to the jury. To the extent this claim refers to the trial testimony of GBI Special Agent Adrian McCravy, this claim was addressed and decided adversely to Petitioner on direct appeal to the Georgia Supreme Court, and is therefore barred by the doctrine of *res judicata*. Sears v. State, 268 Ga. at 764-765(12). To the extent this claim refers to the trial testimony of Detective Laurie Bello and Major Jim Burns, this claim was addressed and decided adversely to Petitioner on direct appeal to the Georgia Supreme Court, and is therefore also barred by the doctrine of *res judicata*. Sears v. State, 270 Ga. at 842(5);

t) **That portion of Claim XXIII and Claim XXVII,** wherein Petitioner alleges that the Prosecution/State presented testimony it knew or reasonably should have known was perjured;

u) **That portion of Claim XXIV,** wherein Petitioner alleges that the State took advantage of Petitioner's ignorance of the undisclosed favorable information by arguing to the jury that which it knew or should have known to be false and/or misleading;

v) **Claim XXV,** wherein Petitioner alleges that the State destroyed potentially exculpatory evidence in violation of his constitutional rights;

w) **That portion of Claim XXVI**, wherein Petitioner alleges that he was denied his constitutional rights when the trial court erred in refusing to suppress evidence seized from Petitioner's parent's home shortly after his arrest. To the extent this claim refers to whether Petitioner provided a valid and voluntary consent for the search, this claim is barred by the doctrine of *res judicata*. Sears v. State, 268 Ga. at 762-763(4);

x) **That portion of Claim XXVIII**, wherein Petitioner alleges trial court errors during the guilt/innocence phase of Petitioner's trial in that:

1) the trial court gave improper, confusing and unconstitutionally vague instructions to the jurors concerning, among other things, murder,

kidnapping with bodily injury, mitigating circumstances, reasonable doubt, and rape To the extent this claim refers to alleged trial court error in denying Petitioner's request to give an instruction on simple kidnapping as a lesser included offense, in refusing to charge that kidnapping is a continuing offense, in refusing to charge that an element of kidnapping with bodily injury is that the bodily injury caused the victim's death, and in refusing to charge that the evidence regarding the rape was admitted solely as an essential element of the crimes charged, this claim is barred by the doctrine of *res judicata*. Sears v. State, 268 Ga. at 766 (16);

2) the trial court erred in erroneously denying Petitioner's motion to quash the State of Georgia's notice to seek the death penalty, and

3) the trial court erroneously overruled Petitioner's objection to the prosecution's charge to the jury on the proper venue for the crime of kidnapping with bodily injury;

4) the trial judge improperly issued a report which consists of an unconstitutional comment by the lower court upon guilt of the accused in which Petitioner contends is allegedly factually inaccurate and misleading to any consideration regarding proportionality of Petitioner's death sentence;

5) the trial court improperly denied defense counsel's objections and motions for mistrial; and

6) the trial court erred in denying Petitioner's pre-trial motion to obtain information including information regarding any "deals";

y) **That portion of Claim XXX**, wherein Petitioner alleges that the trial court erred in admitting non-statutory aggravating evidence at sentencing. To the extent this claim is referring the admission of Petitioner's lack of remorse and the testimony of Officer Bello and Major Burns, this claim is barred by the doctrine of *res judicata*. Sears v State, 262 Ga. at 808(7) and Sears v State, 270 Ga. at 842(5);

z) **That portion of Claim XXX**, wherein Petitioner alleges that the trial court erred by erroneously denying Petitioner's motion for a mistrial that was based on clear evidence of jury misconduct and/or juror deadlock during the sentence phase of trial;

aa) **Claim XXXII**, wherein Petitioner alleges that Georgia's aggravating circumstances, O.C G.A. § 17-10-30(b)(2) and (b)(7), are unconstitutionally vague and arbitrary;

bb) **Claim XXXIII**, wherein Petitioner alleges that the trial court erroneously permitted the prosecution to introduce victim impact testimony in violation of Petitioner's constitutional rights,

cc) **That portion of Claim XXXVI**, wherein Petitioner alleges that his constitutional rights were violated by juror misconduct, which included, but was not limited to, alleged violation of their oaths; alleged violation of the court's instructions; allegedly made improper and unlawful attempts to contact, and/or did contact, court officials, the parties, witnesses, and/or other outside sources and/or influences; alleged improper consideration of matters extraneous to the trial; alleged refusal of certain jurors to deliberate, alleged *ex parte* deliberations by certain jurors; alleged improper biases of jurors that infected their deliberations; and allegedly improperly prejudging Petitioner's case; and

dd) **Claim XXXVIII**, wherein Petitioner alleges that the Unified Appeal Procedure is unconstitutional.

C. Non-cognizable Claims

Some of Petitioner's enumerated claims for relief alleged in this amended petition sets forth an issue which fails to allege a cognizable claim for relief under O.C.G.A. § 9-14-41 et. seq. The following claims fail to allege grounds which would constitute a constitutional violation in the proceedings which resulted in Petitioner's conviction and sentence and are therefore barred from review by this Court as non-cognizable under O.C.G.A § 9-14-42(a).

1) **Claim VI**, wherein Petitioner alleges that execution by lethal injection is cruel and unusual punishment; this claim is non-cognizable as it fails to allege a substantial violation of constitutional rights in the proceedings which resulted in Petitioner's convictions and sentences;

2) **Claim VII**, wherein Petitioner alleges that death by lethal injection would subject him to punishment under a law which is *ex post facto*; this claim is non-cognizable as it fails to allege a substantial violation of constitutional rights in the proceedings which resulted in Petitioner's convictions and sentences;

3) **Claim VIII**, wherein Petitioner alleges that the statute under which he was sentenced to death, O.C.G.A. § 17-10-38, was declared

unconstitutional in Dawson v. State, 274 Ga 327, 554 S.E.2d 137 (2001). and argues that his death sentence is therefore null and void and may not be carried out without allegedly violating his constitutional and legal rights; this claim is non-cognizable as it fails to allege a substantial violation of constitutional rights in the proceedings which resulted in Petitioner's convictions and sentences;

4) **Claim IX**, wherein Petitioner alleges that to an exact a sentence of death upon Petitioner after more than 12 years on death row constitutes cruel and unusual punishment this claim is non-cognizable as it fails to allege a substantial violation of constitutional rights in the proceedings which resulted in Petitioner's convictions and sentences;

D. INEFFECTIVE ASSISTANCE OF COUNSEL (Claims I and II of Petitoner's Posthearing Brief)[3]

1. Legal Standard

A person charged with a crime is entitled, under the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment, to effective assistance by an attorney Gideon v Wainwright, 372 U.S. 335 (1963). The standards for evaluating effective assistance were established in Strickland v Washington, 466 U.S. 668 (1984). To prevail on a claim of ineffective assistance one must show that counsel's performance was deficient and that counsel's deficient performance was so serious as to deprive him of a fair trial. See Strickland, 466 U S. at 686. In other words, a defendant must show that counsel's performance fell below reasonable standards prevailing under professional norms and that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have

[3] Petitioner's claims regarding ineffective assistance of counsel are also raised at Claims I and XXVII, and footnotes to various claims of the amended petition.

been different. Id at 688, 694. This standard has been adopted by the Georgia Supreme Court in Smith v. Francis, 253 Ga 782 (1985).

In a capital case there is an added obligation imposed on counsel to not only conduct a thorough investigation, but to conduct one into the client's background and life history for potential mitigating evidence. Williams v. Taylor, 529 U S. 362 (2002). This does not, however, require counsel to follow every lead. Wiggins v. Smith, 539 U S 510 (2003) Rather than focusing on what would have been shown if it had been sought, the focus is on whether counsel's actions, under the circumstances then existing, were reasonable. Wicks v. State, 278 Ga. 550 (2004). Strategic choices made after less than complete investigation are reasonable to the extent that reasonable professional judgments support the limitations on investigation. Strickland, 466 U.S. at 690. However, where failure to investigate thoroughly results from inattention, not reasoned strategic judgment, counsel's performance is unreasonable. Wiggins, 539 U.S at 525.

In examining a claim of deficient performance, the court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, i e., "[c]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland at 690. Even if many reasonable lawyers would not have done as defense counsel did at trial, no relief can be granted on ineffectiveness grounds unless it is shown that no reasonable lawyer, in the circumstances, would have done so. Rogers v. Zant, 13 F. 3d 384 (11th Cir. 1994). This examination must be conducted from the vantage point of counsel at the time, thus eliminating the distorting effects of hindsight. Strickland at 688.

If deficient performance is shown, then the Petitioner must establish that the results of the proceeding would have been different, but for the deficient performance. When applied to the

sentencing phase of death penalty trials, the question is whether there is a reasonable probability that, absent the errors, the sentencer would have concluded that the balance of the aggravating and mitigating circumstances did not warrant death. Smith v. Francis, 253 Ga. 782 (1985). In answering this question the court is not permitted to focus on a mere outcome determination from a perspective of hindsight Lockhart v. Fretwell, 506 U.S 364 (1993)

2. Ineffective Assistance of Counsel as the Result of the Application of Law Under Sabel v. State. (Claim I)

To the extent this claim alleges ineffective assistance of counsel because of the application of Sabel v. State, 248 Ga. 10 (1981), it is properly before the court. Portions of the claim alleging that Petitioner's right to a fair trial, to present a defense, due process. equal protection. and a fair determination of punishment, were violated by the application of Sabel to Petitioner's case were decided adversely to Petitioner on direct appeal. Sears v. State, 268 Ga at 760-61. Therefore, the aspects of the instant claim apart from ineffective assistance of counsel are procedurally barred as *res judicata* to the extent these portions of the claim were addressed by the Georgia Supreme Court. and procedurally defaulted to the extent the portions of the claim were not raised on direct appeal.

At the time of Petitioner's trial, Sabel v. State required that a criminal defendant turn over to the State the identity and reports of defense experts regardless of whether the defendant chose to present the testimony of the experts regardless of whether the defendant chose to present the testimony of the expert at trial. In Rower v. State, 264 Ga 323 (1994), decided after Petitioner's trial but before the hearing on his motion for new trial, the Supreme Court recognized that Sabel placed an unequal and unfair burden on defendants and overruled it. Petitioner now claims his

trial counsel were rendered ineffective because the rule of Sabel resulted in a "chilling effect" on Petitioner's legal representation that was "constitutional error" (Pet. post-hearing brief 38). However, it appears to this court that the Sabel argument now being advanced by Petitioner is not a true ineffective assistance of counsel claim. The complaint is not about conduct of counsel, but is rather about the effect of the existence of a legal principle which was not applied in his case. (Petitioner was not required to turn over the names and reports of experts.) If Petitioner's assertion were to be considered a true ineffective assistance of counsel claim, then appellate and habeas counsel would be permitted to assert that the application, and even existence, of any principle of law, not just those later found to be unfair, rendered counsel ineffective.

On direct appeal in Sears v. State the Supreme Court held that Petitioner "failed to show any chilling effect or other harm from the ruling that he must give the name of his expert to the State." Id. at 761. Because the Supreme Court found no constitutional error with regard to the application of Sabel, Petitioner cannot now prevail by arguing that his constitutional rights were violated by the "chilling effect" Sabel had on the effectiveness of counsel. This court simply cannot re-litigate the correctness of the Supreme Court opinion in this case regarding the application of Sabel

3. **Ineffective Assistance of Counsel at the Penalty Phase of Trial. (Claim II)**

The Petitioner asserts that trial counsel's performance at the penalty phase of trial was inadequate. The court agrees. Counsel's investigation for mitigation evidence was limited to one day or less, talking to witnesses selected by the defendant's mother. The group consisted of Petitioner's brother and family friends. (P. Ex. 45, HT 2292-2344) This, on its face, is not a thorough investigation and is constitutionally inadequate.

Petitioner's attorneys put many hours of work into his case: Mr Gary 370 hours and Mr Treadway 443 (Res. Ex 124, HT 5067-5086). Less than 8 of each were spent interviewing potential mitigation witnesses They traveled to Kentucky and Ohio for a week to interview potential trial and mitigation witnesses, but spent less than one day interviewing potential mitigation witnesses They asked many questions to the family and family friends Petitioner's mother had assembled during the day they were there They gathered useful information about the Petitioner that enabled them to develop a mitigation theory to present at trial. They asked Petitioner's mother for his school records, but obtained none and did not follow-up. (Res. Ex. 124, HT 5066). Mr Treadway met with family members again before trial and spoke with them on the phone on occasion. (Res. Ex. 124, HT 4909). He did not, however, expand his search for mitigation evidence beyond the narrow group of family and friends Petitioner's mother had assembled at her home. Trial counsel sought funds to obtain a psychological expert, but did not attempt to gather evidence from anyone other than the small group of family and friends that may have helped them evaluate the likelihood that the psychological evaluation may have produced valuable results. Counsel employed an investigator, but there is no evidence that the investigator expanded the search for mitigation evidence to be used on the Petitioner's behalf beyond that gathered by counsel on their Ohio visit. Counsel had reason to question the accuracy of some of the information given them by Petitioner, but they sought neither to confirm nor rebut it other than through the information obtained from family and friends during their one day of conversation

In reaching its conclusion the court is not focusing on what would have been shown if it had been sought (the record is largely silent on this), but rather on whether counsel's actions, under the circumstances, were reasonable While no bright line can be drawn as to the amount of

time and effort counsel should spend in search of and interviewing potential mitigation witnesses, and strategic choices made after less than a complete investigation may be reasonable. the court has been unable to find evidence of the exercise of good professional judgment in terminating the investigation after less than one day. The decision does not appear to be based on strategic choice, but inattention The court believes that no reasonable lawyer would terminate his investigation for mitigation evidence in a death penalty case after talking to a handful of witnesses selected and gathered by their client's mother. The court believes that no reasonable lawyer would terminate his investigation for mitigation evidence in a death penalty case where their client is acting in a bizarre manner, without exploring fully the possible reasons. Sabel was certainly an obstacle here, but counsel, due to their limited investigation, were unable to properly evaluate ~~properly~~ the risk of going forward with the evaluation. No one knows what would have been found with a reasonable investigation. and that is not the focus here. But without seeking that information it cannot be said that counsel's decision to withdraw the motion for evaluation was a reasonable strategic decision. In summary, it appears that counsel acquired only a limited knowledge of the defendant's history from a narrow set of sources. Wiggins considers such practice to be unreasonable where no good explanation has been given for terminating the investigation after less than a day. All potentially mitigating evidence must be investigated unless reasonable professional judgment supports the limitation. Here, it is impossible that all potentially mitigating evidence could have been investigated in less than a day and no reasonable professional judgment has been shown that would support the limitation

The second prong of the ineffective assistance of counsel analysis focuses on the probable outcome. On this point the Petitioner has failed to establish that there is a reasonable

likelihood that the outcome of his trial would have been different if his counsel had done more investigation

The law places a heavy burden on a defendant attempting to show prejudice. Although here, the Petitioner can argue that a prior appeal shows the difficulty one juror was having reaching the same verdict as the others, it is just not possible to know what effect a different mitigation theory would have had on her, just as it is impossible to know what effect it would have had on other jurors. This case cannot be fairly compared with those where little or no mitigation evidence is presented and where a reasonable prediction of outcome can be made. Here, although counsel failed to investigate thoroughly, they did develop a reasonable mitigation theory with evidence to support it. Because counsel put forth a reasonable theory with supporting evidence, Petitioner has failed to meet his burden of proving that there is a reasonable likelihood that the outcome at trial would have been different if a different mitigation theory had been advanced.

4. Other Ineffective Assistance of Counsel Claims

In his amended petition, Petitioner has asserted numerous grounds of ineffective assistance of trial counsel. The Court finds that the claims that Petitioner has neither briefed nor presented evidence in support thereof, are deemed abandoned, and are accordingly denied.

E. OTHER CLAIMS BRIEFED BY PETITIONER

1. Imposition of Death Sentence Inconsistent with Evolving Standards of Decency in Violation of the Eighth Amendment (Claim III of Petitioner's Posthearing Brief)

In Claim III, Petitioner claims that the imposition of the death penalty is unconstitutional in this case because Petitioner's disabilities and mental illnesses render him the "functional, moral, legal, and constitutional equivalent" of someone who is mentally retarded or a youth.

Petitioner relies on the Roper v. Simmons, 543 U.S. 551, 568 (2005); and Atkins v. Virginia, 536 U.S. 304 (2002).decisions by the United States Supreme Court in arguing that the evolving standards of decency require that the death penalty should be struck down as applied to the mentally ill defendants such as Petitioner However, Petitioner is neither mentally retarded (as in Atkins), nor a juvenile at the time of his crime (as in Roper). While those two groups are no longer subject to capital punishment, there is no constitutional prohibition against the execution of the mentally ill.[4] Lewis v. State, 279 Ga. 756, 764 (2005)(finding that "unlike a verdict of guilty but mentally retarded, the statute that provides for a verdict of guilty but mentally ill does not preclude a death sentence as a result of such verdict"). The Georgia Supreme Court rejected a similar claim in Lewis and specifically "decline[d] to extend the holdings of cases like Atkins" to a Petitioner who claims to be mentally ill 279 Ga. at 764

Accordingly, this claim is denied

2. Suppression of Co-Defendant's Criminal Record in Violation of Brady v. Maryland Claim IV of Petitioner's Posthearing Brief)[5]

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[4] The United States Supreme Court has held that the Eighth Amendment prohibits inflicting the death penalty on prisoner who is insane. Ford v Wainwright, 477 U.S 399 (1986). Petitioner has made no showing of legal insanity.

[5] Petitioner also raises the instant claim in Claims XXIII and XXIV of his Amended Petition.

Petitioner argues that the state suppressed evidence concerning the co-defendant Phillip Williams's assault on another inmate at the jail in violation of Brady v. Maryland, 373 U.S. 83 (1963). Petitioner asserts that such evidence would have also served to answer the State's argument at trial that Petitioner was the most dangerous inmate at the Cobb County jail.

As set forth in section I.B, above, the instant claim is procedurally defaulted in that Petitioner has failed to raise it on direct appeal. However, even the Court were to find that there were cause and prejudice for the default and to consider it on the merits, it would still fail.

In order to prevail upon a Brady claim, Petitioner must establish that there was evidence, favorable to the accused, suppressed by the State, that Petitioner could not otherwise obtain the evidence, and that but for the suppression of this evidence, there is a reasonable probability that the result of Petitioner's trial would have been different. See Schofield v. Palmer, 279 Ga. 848, 852 (2005)

The State is not required to give the criminal records of witnesses to criminal defendants in Adams v. State, 271 Ga. 485, 487 (1999) (" We have indicated that the holding of the United States Supreme Court in Brady does not extend so far as to require the prosecution to turn over to the defense the criminal records of state's witnesses.") (internal quotations and citations omitted.

Although the state had information regarding the criminal record of another witness in its file, there is no evidence that the State suppressed the information concerning the co-defendant from discovery by Petitioner.

Petitioner has established that the evidence alleged to be suppressed was favorable. However, Petitioner has not established the that the evidence in the possession of the state, that Petitioner could not obtain the evidence with reasonable diligence, and that the prosecution

suppressed the evidence. However, even assuming that the other prongs were established, the Court finds that there is not a reasonable likelihood the result of either phase Petitioner's trial would have been different but for this suppression. This claim is therefore denied

3.. **Cumulative Error (Claim V of Petitioner's Posthearing Brief)**

Petitioner alleges that the cumulative effect of the constitutional errors[6] which occurred at Petitioner's trial and sentencing resulted in an unreliable conviction and death sentence and violated the Fifth, Sixth, Eighth, and Fourteenth Amendments. Georgia does not recognize a cumulative error doctrine Morrison v. State, 276 Ga. 829, 834 (2003) Accordingly, this claim is denied.

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[6]Included in Petitioner's discussion of cumulative of error is a statement that the trial court's sentencing phase jury instructions were "highly prejudicial and misleading". This claim is raised independently in the Amended Petition as Claim XXXV and portions of Claim XXX. Because errors in sentencing phase jury instructions are "never barred by procedural default", this claim is properly before this court for a review on the merits. Head v. Ferrell, 274 Ga. 399. 403 (2001). However, Petitioner did not brief this claim or present evidence in support of this claim. A review of the sentencing phase instructions, in their entirety, establishes that Petitioner has failed to establish that the trial court erred. Accordingly, the claim is denied.

IV. DISPOSITION

After considering the allegations made in Petitioner's original and amended petitions for Writ of Habeas Corpus, Respondent's original and amended answers, relevant portions of the appellate record, the evidence admitted in the hearing held on this matter on January 19, 2006, the arguments of counsel and the post-hearing briefs, this Court concludes Petitioner has failed to demonstrate that any of Petitioner's constitutional rights were denied.

THEREFORE, it is the **JUDGMENT** of this Court that Petitioner's Petition for Writ of Habeas Corpus is hereby **DENIED as to the Petitioner's conviction and sentence.** The Clerk of this Court is hereby directed to provide a filed copy of this order to Petitioner, counsel for Petitioner, counsel for Respondent, and this Court.

SO ORDERED, this 7th day of Jan., 2008.

John E. Girardeau

Hon. John E. Girardeau
Superior Court of Butts County
Sitting by Designation

APPENDIX C

1. EXCERPTS FROM PETITIONER'S EXHIBIT NO. 1 AFFIDAVIT AND REPORT OF DR. TONY L. STRICKLAND[1]

* * * *

Pet. Ex. 1, HT 146-150:

My name is Dr. Tony L. Strickland. . . . . I am a psychologist licensed by the state of California and a Qualified Medical Evaluator (Neuropsychology) of the State of California Department of Industrial Relations. My doctorate was conferred by the University of Georgia in 1986 with a major in Clinical Psychology (Behavioral Medicine). I hold a number of additional psychological and neuropsychological certifications. Among my current appointments, I am Professor of Psychiatry and the Director of the Behavioral Neuroscience Research Center and Memory Disorders and Cerebral Function Clinic at the Charles R. Drew University School of Medicine and Science and an Associate Professor of Psychiatry-In-Residence of the Traumatic Brain Injury Program of the Division of Neurosurgery of the David Geffen School of Medicine at UCLA. I frequently publish articles concerning neuropsychology in peer-reviewed profession journals, including Psychiatric Annals, Dementia and Geriatric Cognitive Disorders, Journal of Neuropsychiatry and Clinical Neuroscience, and the American Journal of Psychiatry, among others. . . .

. . . At the request of counsel for Demarcus Sears, I performed a neuropsychological assessment of Mr. Sears in connection with his application for post-conviction relief. I was asked by counsel to administer a neuropsychological protocol to Mr. Sears and determine his level of neurobehavioral functioning based upon the test results, my observations of Mr. Sears, and the information known to me through documents about his medical, legal and social history.

A report documenting my findings is attached hereto as Exhibit "A." I personally performed all record review, testing and interpretation. I am confident in the conclusions contained in my report to a reasonable degree of professional certainty. Because my findings are thoroughly and exhaustively detailed in the report attached, I will not fully reiterate them here. Instead I would like to draw attention to significant aspects of my findings with regard to Mr. Sears and further explain the implications of those findings.

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[1] Petitioner's Exhibit No. 1 was admitted at the hearing, as were all of the Exhibits referenced by Dr. Strickland's Affidavit and Report. Dr. Strickland affirmed his assessment in testimony received at the hearing the hearing.

Mr. Sears' test results are consistent with significant frontal lobe abnormalities. The frontal lobe of the brain is locus for what is referred to in the professional vernacular as executive functioning. Executive functioning refers generally to those cognitive processes that enable us to conform our behavior to expectations, process information, shift our approach in the face of obstacles or changed circumstances (""shift sets") and sequence our actions appropriately. Persons with these deficits, with a high degree of predictability, have problems with planning, sequencing and impulse control. They generally make poor decisions and become increasingly disorganized under stress.

Mr. Sears' frontal lobe deficits are most prominent on clinical observation and on measures sensitive to executive functioning: the Stroop Color and Word Test, the Trail-Making Tests (both A & B) and the Symbol Digit Modalities Test. The Stroop Color and Word test involves conflicting sets of stimuli simultaneously being imparted to the patient. The patient is instructed to suppress one of the stimuli and respond to the other as rapidly as possible. Thus, the patient must concentrate on only the cues the examiner has told him are relevant and refrain from being distracted by, or impulsively calling out in response to, the prohibited stimuli. Mr. Sears had very limited ability to do so. His scores on the Stroop not only placed him in the severely impaired range, but his scores actually fell below the first percentile, making him among the most impaired individuals in the population in terms of ability to suppress competing impulses and conform behavior only to relevant stimuli.

The Trail-Making Test B involves the patient's ability to adhere to a principle and apply that principle to rapidly sequence a series of numbers (and in the case of Test B, letters). Thus the patient must recall the objective, apply it without distraction and make determinations about the next action based upon those objectives. Mr. Sears' performance was again dramatically weak, and placed him at the first percentile.

On the Symbol Digit Modalities Test, the patient must fill-in a corresponding number next to each of a series of symbols utilizing a key to the symbols. The faster the patient learns and retains the associations on the key, the less he must look at the key and the faster he progresses. The patient is tested on their ability to repeatedly and uniformly identify and apply associations. Mr. Sears again showed severe impairment.

The patient also performed poorly on the Auditory Consonant Trigrams Test. On this task, the patient is presented with a stimulus set of three consonants (e.g. QLX), is asked to recall the set while subtracting backwards from different numbers for four different delay periods (immediate recall, three/nine/eighteen seconds delay). The task is considered a measure of frontal-subcortical functioning. For the

two time delays (9 seconds and 18 seconds) for which the most extensive normative data exists, the patient's performance was in the range of severe impairment on both delays (9 second delay, 5/15, 1st %ile; 18 second delay, 5/15, 4th %ile).

Together the results of these tests reveal a marginal capacity for reflection and decision-making, particularly when faced with distracting stimuli. His ability to organize his choices, assign them relative weight and select among them in a deliberate way is grossly impaired. He instead reacts to problems impulsively and becomes disorganized and confused.

With regard to the neuropsychological tests administered to Mr. Sears, the results were remarkable for the extremity and sheer number of clinical symptoms reflected. Mr. Sears reported symptoms consistent with high levels of anxiety and depression. Overall, Mr. Sears presented as an individual plagued by extreme distress, emotional instability and low self-worth. His is likely to have difficulty managing his emotional states and relating to others, and his stress and anxiety contribute to the worsening of his neurocognitive deficits.

Mr. Sears' test results are believed to be valid. He achieved perfect scores on both the TOMM and the Rey – two basic tests for malingering. Thus, it is likely that Mr. Sears put forth good effort. Furthermore, there is little chance that Mr. Sears is "faking" the specific summary profile revealed across tests. On many measures, Mr. Sears's brain function performance was in the average (as with memory) or above average (as with tests of language) ranges. It was measures of executive function where clinically significant impairments were noted, a profile difficult for the lay person to fake.

The neurocognitive and psychological deficits reflected in the testing are entirely consistent with Mr. Sears's history. Deficits in executive function are typically seen in patients with a history of significant or repeated head trauma and/or extensive use of drugs and alcohol. Such deficits in executive functioning – as well as the emotional and mood dysregulation reflected in Mr. Sears's testing – also have high co-morbidity rates with early traumatic environments and childhood maltreatment. Mr. Sears's history is replete with multiple head trauma, substance abuse and traumatic experiences of the type expected.

The deficits Mr Sears's registers would, in my opinion, have been apparent in the early 1990's. The conditions of Mr. Sears's current confinement in a maximum security correctional facility moderate the impact of his existing neurocognitive impairment. Structured environments, where there are few choices to be made, are beneficial to Mr. Sears given his severe frontal lobe deficits. Furthermore, in conditions of extreme predictability and control such as those that exist in prison; there is further opportunity for recovery from traumatic brain insult. Thus, not only would Mr. Sears serious cognitive impairment and emotional

instability have been captured on tests administered early in his period of incarceration, they likely would have revealed more profound deficits than those that existed at the time of my testing.

* * * *

Pet. Ex. 1, Ex. A., HT 152:

EXHIBIT A
SUMMARY OF NEUROPSYCHOLOGICAL CONSULTATION

* * * *

I had the opportunity to evaluate Mr. Demarcus Sears in neuropsychological consultation at your request at the Georgia Diagnostic and Classification Prison in Jackson, Georgia, on August 12 and 13, 2004.

* * * *

Pet. Ex. 1, Ex. A., HT 152:

Mr. Demarcus Sears is a 32-year-old right-handed African-American male, born November 12, 1971, in Richmond, Virginia. He has lived on Death Row since 9/27/93 following conviction and sentencing for the crimes of kidnapping with bodily injury and armed robbery.

* * * *

Pet. Ex. 1, Ex. A., HT 174-176:

Review of the history and available records are consistent with an impression of the influence of multiple factors to include possible birth trauma, significant developmental instability, and learning disability in school, contributory traumatic brain injuries, and the use of illicit drugs. The patient indicated that his mother told him he was "pronounced dead at birth", although details related to this are unavailable to this examiner. Mr. Sears had lived in six different locations by age 15 years. His parents had significant conflict, divorced, and later reunited. The father was described in school records as overbearing with unrealistic expectations for Mr. Sears. During the evaluation, the patient's comments about both parents uniformly were negative and hostile. As early as the second grade, the patient was identified as having learning difficulties. At later times, he would be described as severely learning disabled and as severely behaviorally handicapped. His attention was poor during those years and he was noted to have behavioral problems to include poor ability to follow directions as well as a lack of self-confidence. There is

a history of three traumatic brain injuries predominately affecting the frontal region of his brain. These occurred at ages seven, nine, and 15-16 years of age. By the patient's own report, he turned to illicit drug use as early as age 12 or 13 years He consistently used marijuana and cocaine up until the time of his incarceration on 11/1/90.

Review of available records, the patient's prior educational, familial, and interpersonal functioning, as well as the clinical interview with the patient, are consistent with the impression that the patient has suffered significant brain pathology secondary to multiple factors. These factors include his early traumatic brain injuries and his use of illicit drugs over many years preceding his incarceration These factors likely influenced the manifestation of his learning disability and exacerbated attentional problems while in school. As has been noted, Mr. Sears' major neuropsychological deficits are in the areas of attention/concentration and executive functions. These deficits are seen commonly in significant traumatic brain injury as well as secondary to extensive use of drugs of abuse. Numerous studies have outlined the effects of chronic marijuana and cocaine use on frontal lobe functioning to include the areas of attention/concentration, planning, sequencing, judgment, problem solving, and impulse inhibition, all areas on which Mr. Sears has shown clinically significant deficits during this evaluation. His level of depression and anxiety alone would not account for the magnitude of the findings during this evaluation. In fact, depression and anxiety frequently affect memory functions negatively. Yet, Mr. Sears generally performed well within the average range on almost all measures of memory.

One might wonder how the influence of the patient's marijuana and cocaine use might be discerned after such a long period of incarceration, one in which it is unlikely that the patient has had access to such drugs. It is medically probable that, given the patient's high level of chronic use of drugs prior to his incarceration, that he had suffered diminution of his frontal/executive functions long before October 1990 when he committed the incident offense. In fact, he likely was far more impaired in those functions than at present. This is despite the fact that the patient, in his own testimony, denied being under the influence at the time of the offense. That may well be true. However, the chronic neurocognitive effects likely affected his functioning to include judgment at the time he committed the offense. It is clear that the patient, in his current evaluation, demonstrated a specificity of performance clearly implicating deficits of the frontal/executive system. The neurological/neuropsychological literature regarding developmental plasticity of the human brain has shown the recovery capacity of the brain from insults of many kinds of trauma, including traumatic brain injuries and the neurotoxic effects of illicit drugs. Fourteen years after the commission of the offense, Mr. Sears continues to demonstrate significant deficits in the frontal/executive area. A

reasonable conclusion is that, given likely recovery curves, his deficits in 1990 were far more severe than demonstrated in this evaluation.

Thus, it is my professional opinion that the patient demonstrates a current pattern of deficits consistent with frontal/executive deficits likely caused predominantly by the synergistic effects of repeated traumatic brain insults and chronic marijuana and cocaine use. These effects are likely to have been far more profound on his functioning at the time of the commission of the incident offense in October 1990.

2. **EXCERPTS FROM PETITIONER'S EXHIBIT NO. 3**
AFFIDAVIT OF RICHARD G. DUDLEY, JR., M.D.[2]
(Footnotes Omitted)

* * * *

Pet. Ex. 3, HT 241:

1. My name is Richard G. Dudley, Jr. I am over the age of 18 and competent to make this affidavit. My business address is 466 West 144th Street, New York, New York 10031. My phone number is (212) 926-0122.

2. I am a physician licensed to practice medicine in the State of New York and board certified in psychiatry by the American Board of Psychiatry and Neurology. Since 1984, I have had a full-time private practice in psychiatry in New York City, where I spend about half of my time as a treating psychiatrist and the other half of my time involved in various types of forensic matters. I am an Adjunct Assistant Professor at the New York University School of Law, and a visiting Associate Professor at the City University of New York Medical School at City College. . . .

* * * *

Pet. Ex. 3, HT 244:

7. . . .On December 16-17, 2004 and again on February 3, 2005, I conducted a psychiatric examination of Mr. Sears in the attorney visitation room at the Georgia Diagnostic Prison in Jackson, Georgia. I spent a total of approximately 10-11 hours with Mr. Sears over the course of these three days observing his mental status and general functioning; and exploring with Mr. Sears his life history, including the various difficulties he has had and his responses to those difficulties; and also exploring with Mr. Sears his feelings about himself and his understanding of himself, among other subjects. I also conducted extensive clinical interviews with Mr. Sears's parents, Frank Sears and Virginia Graves, at their respective homes in

[2] The Exhibits referenced by Dr Dudley were admitted into evidence at the hearing as was his earlier Affidavit and deposition testimony.

the Cincinnati, Ohio area on March 3, 2005, and with Mr. Sears's maternal aunt, Jean Squire Smith, on March 2, 2005.

* * * *

Pet. Ex. 3, HT 245.

SUMMARY OF FINDINGS

10. . . . .The information gathered as part of my assessment established a picture of Mr. Sears as severely compromised in his capacity for sound decision-making and reasoned behavior. The combined effects of Mr. Sears's profound cognitive deficits, as identified by Dr. Strickland, and gross psychiatric disturbances, outlined below, have been profoundly debilitating. I found during by clinical examination of Mr. Sears that he exhibits extreme impulsivity, drastically impaired executive functioning, inappropriate affect, mood disturbance and grandiose thinking that is so severe that his contact with reality is at times tenuous. This constellation of symptoms is consistent with Mr. Sears's social and developmental history, as outlined in the affidavits and other records available to the court, as well as with the history and observations gleaned during my clinical interviews with each of Mr. Sears's parents. . . .

* * * *

Pet. Ex. 3, HT 245-250.

CLINICAL INTERVIEW AND PSYCHIATRIC SYMPTOMOLOGY

11. Mr. Sears is a tall, slender, right-dominate African-American man who appeared his stated age of 34 years. He has a prominent scar on his temple resulting from striking his head during a fall at a skating rink, and another on the left forehead resulting from being struck by a golf club. . . . Though he was cooperative throughout the interviews, Mr. Sears was resistant to the notion that he might be suffering from a mental disorder and skeptical that counsel's efforts to explore this possibility would lead to anything in the way of evidence that might be useful to his case.

12. Though Mr. Sears seemed considerably motivated to portray himself as high functioning, a number of profound psychiatric problems became apparent during our meeting. Most notably, much of Mr. Sears's discourse implicated serious neurological impairment: he lacked forethought and judgment, was unable to identify relevant possibilities or options when presented with a problem, was unable to organize or weigh alternatives even when I suggested varying choices/answers, and his discourse tended to be overly spontaneous and tangential. In addition, much

of his behavior was oddly inappropriate. His mood was labile, he was easily agitated and despite my efforts to focus him, he would talk non-stop about issues that were more appropriately discussed with members of his legal team.

13. Second, it became obvious that Mr. Sears's thinking was distorted. He exhibited substantial grandiosity. He regards himself as uniquely savvy, even when questioned or confronted with clear evidence of his past failures in judgment or the reality of his present confinement on death row. He ascribes to a notion of himself as "special" and believes that he has needs and thoughts that no one else does and that others are incapable of understanding. Much of his grandiosity is centered on his importance to others, his sexual prowess or his unique status as a target or victim. In addition, during our interview, he told a number of stories that were wildly fantastic and implausible. For instance, Mr. Sears believes that at age twelve, while living with his mother and her boyfriend in North Carolina, he purchased a ring, proposed to and married another middle school student. He told of how his new "wife" was then killed when a drunk driver struck the car in which she was riding. Mr. Sears reported that he was standing on the sidewalk at the intersection and able to observe her at the moment she died in the crash. He also related extensive fantasies of being a rap star and gang member, and reported innumerable sexual experiences, consensual encounters which he insisted date back to age six or seven.

14. As will be described below with reference to Mr. Sears's history, Mr. Sears's grandiose thinking is clearly a psychological defense mechanism devised to thinly shield himself from debilitating feelings of emptiness and worthlessness. It is an extremely immature and fragile psychic schema which explains, in part, the substantial mood lability also observed during my evaluation. During the evaluation, Mr. Sears cycled rapidly between arrogance and self-disgust and despair. When his psychological defenses failed, substantial depression broke through in spite of the grandiose subject matter of his discourse. My interactions with Mr. Sears made clear to me that he has little ability to self-regulate; his emotions shifted rapidly with little obvious impetus. Perhaps the only emotional state which remained static throughout our interview was his substantial anxiety: his breathing was shallow, his hands and voice were unsteady, his movements were abrupt and his eyes moved rapidly around the table at which we were seated and around the room.

ETIOLOGY OF SYMPTOMS

15. The severity of Mr. Sears's symptoms is explained by the fact that they have multiple convergent etiologies. First, it is obvious that Mr. Sears's functional deficits and other behavioral problems, particularly his grossly impaired judgment and impulse control, have an organic source. Mr. Sears's brain damage is detailed more fully in the report of Dr. Strickland's findings, and I will not reiterate those

findings here but to say that Mr. Sears unquestionably bears the hallmarks of severe neurological damage: an inability to identify, organize and weigh alternatives, marked difficulty in predicting likely outcomes, an inability to read others' reactions and motivations, and impulsive and inappropriate speech.

16. Not surprisingly, Mr. Sears and his family members recall a number of significant head injuries, including injury severe enough to have resulted in a loss of consciousness. Persons who have suffered head trauma, particularly those who have suffered a head injury implicating the still-developing brain of childhood, show a disproportionate degree of cognitive impairment, psychiatric disturbance and personality maladjustment. Mr. Sears's older cousin recalls that Mr. Sears was the cousin who "had the most mishaps" and suffered a number of blows to the head between the ages of four and eight. As a toddler, he was taken to the hospital after hitting his head on the corner of his grandmother's coffee table, and on another occasion hit his head on a park swing. Around age seven, an older child kicked Mr. Sears's roller skate from beneath him, causing him to strike his head on the rink floor and lose consciousness and necessitating a trip to the hospital. On another occasion, Mr. Sears stood too close to another child who was about to swing a golf club and was struck in the temple and knocked out when the other boy drew the club back. Finally, Mr. Sears reports getting into a number of altercations as a teenager, including a time when he was struck in the head with a baseball bat. The sheer number of the head injuries is significant as well; in that the increased number of traumas also increases the degree and likelihood of damage to the brain. (Affidavit of Kenya Smith; Affidavit of Jean Squire, Affidavit of Virginia Graves, Interview with Frank Sears, Interview with Demarcus Sears).

17. Mr. Sears mood lability and erratic emotional states also likely have a biological or chemical component, either as a result of a genetically-derived mood disorder or as a result of the changes in brain chemistry and hormonal levels that research shows are associated with repeated exposure to trauma and discord in early childhood. As will be outlined below, Mr. Sears certainly suffered the type of early environment known to induce chronic physiological hyper-arousal and mood dysregulation. Further, Mr. Sears's father exhibited obvious depressive symptoms (and related a history of such) during my interview with him and both parents come from families with histories suggestive of the possible presence of depression or other genetic mood disorders.

18. Given these organic and physiological conditions, Mr. Sears would have been at significant risk of developing a psychiatric disturbance regardless of the environment in which he was reared. However, it should be noted that Mr. Sears's problems are also firmly rooted in his history of early deprivation, a history that only exaggerated the impairments dictated by his biology. Mr. Sears's infancy and childhood were marked by neglect and utter chaos. He was the second of four children born to Frank Sears, Jr. and Virginia (nee Squire) Sears, and both parents

brought to the institutions of marriage and parenthood deep-seated characterological problems and near-total inabilities to bond with one another or the children their marriage produced or to foster a stable living environment.

* * * *

Pet. Ex. 3, HT 254-255:

33. . . . . [N]either parent appears to have given any appreciable attention to Demarcus during his infancy and early childhood in Richmond: Frank [Sears] emphasized to me how little he himself was present in the home, how often he was at work and how little he knew about his children's day-to-day lives in his absence. Virginia [Sears], who openly expressed her disdain for motherhood, reportedly placed the children in day care or left them in the care of her siblings and their children though she didn't work. (Interview with Frank Sears, Interview with Virginia Graves, Affidavit of Virginia Graves, Affidavit of Diane Luckie).

34. On those occasions that Frank and Virginia were around, they both admitted they were far more focused on their turbulent relationship with one another than on their children. Those close to the family report that the marriage was disastrous from its inception and that the two argued almost constantly. Over the years, the fights escalated; Demetrius reports that it got to the point that they would have "screaming knock-down-drag-out fights" (Affidavit of Virginia Graves, Affidavit of Frank Sears, Affidavit of Demetrius Sears, Affidavit of Diane Luckie, Affidavit of Lucephus Squire, Affidavit of Jean Squire).

35. Clinical interviews with both Frank and Virginia confirmed them to be laboring under substantial emotional disturbances resultant from their own dysfunctional histories and grossly ill-equipped for marriage and parenthood. This remained true even some thirty-plus years after the birth of their first child, by which time they were both at an age when maladaptive behaviors and coping mechanisms would be expected to have abated somewhat.

* * * *

Pet. Ex. 3, HT 257:

40. As an initial matter, Demarcus witnessed the constant acrimony and, as the years passed, occasional violence in his parents' marriage. The arguing that had always been a near constant continued, but began to include some physical altercations as well. Though confined to a wheelchair, the affiants report Frank Sears to have been agile and athletic, and a frightening presence. Virginia recounts that the boys witnessed Frank dragging her around by her hair. Virginia, by her own admission, was never one to simply let Frank's aggression go unanswered, and

their fights would sometimes escalate into the "knock-down drag-out fights" recounted by both Demetrius and Demarcus.

* * * *

Pet. Ex. 3, HT 261:

48. Virginia eventually divorced Frank as Demarcus was about to enter middle school. She took all four children with her, but conditions didn't improve. She immediately moved in with her new boyfriend Randy, and then she and Randy moved with the children to North Carolina. Randy was an alcoholic and became physically violent toward Virginia when he drank. Demarcus reports that while his mother and Randy drank and fought, he and his brother had the run of the streets. Demarcus and Demetrius thus spent a crucial developmental period without adult guidance and in the midst of another chaotic relationship. When Virginia determined it was time to go back home, she called Frank and he came to North Carolina to retrieve her and the children.

* * * *

Pet. Ex. 3, HT 262-263:

50. To the extent at Frank and Virginia parented Demarcus at all, it was in ways that would have been detrimental to any child and that only fostered Demarcus's existing cognitive disabilities and emotional disturbances. . . .When Demarcus was referred for a learning disability evaluation at a local health center at age nine, the reviewing physician noted that Demarcus had an "overbearing father with unrealistic expectations for his child." (Affidavit of Demetrius Sears, Affidavit of Virginia Graves, Affidavit of Frank Sears; Affidavit of Diane Luckie, Lincoln Heights Health Center Records for Demarcus Sears, January 1981).

* * * *

Pet. Ex. 3, HT 264-265:

54. By the time Demarcus reached high school Frank's criticism still had not diminished; one of Demarcus's teachers recalls that Mr. Sears came to a parent-teacher conference concerning how to encourage Demarcus academically and then proceeded to "berate Demarcus in front of all [the teachers and the principal]." The teacher reports that she'll "never forget the way [Frank Sears] bullied him." Mr. Sears was so verbally abusive and made such a scene, that it made everyone in the room uncomfortable. In more than twenty years of teaching, she "ha[s] never been in a conference where a parent severely criticized a child" as Frank did. (Affidavit of Carol Becci-Youngs).

55. Demarcus's friends and peers recall Frank Sears as a formidable presence. Not surprisingly, as a child "Demarcus was so scared of Frank that . . . he was in some way emotionally affected. If Frank was at home and Demarcus was in trouble, you only had to look at Demarcus to see how frightened he was." Indeed, Frank counted on this intimidation for continued control of the boys since his mobility was limited by his wheelchair. Frank "wasn't above physical punishment" and sometimes struck the boys with a belt to crystallize this intimidation. (Affidavit of Jean Squire, Affidavit of Diane Luckie, Affidavit of Frank Sears).

56. Virginia also hit the children and verbally abused them. She reports that "Demarcus got a lot of whippings," and that "the ones [she] gave him were memorable." . . . (Affidavit of Virginia Graves, Affidavit of Demetrius Sears, Affidavit of Diane Luckie, Affidavit of William Creecy, Interview with Demarcus Sears)

* * * *

Pet. Ex. 3, HT 269:

65. Demarcus's life prior to the crimes at issue in his current appeal was thus notably and completely devoid of affirming experiences or positive relationships. Quite the contrary, he suffered repeated blows to his developing ego and identity. His own family members regarded him as a non-entity or constant annoyance. When he dropped out of high school and began to use his brother's drugs on a daily basis in a predictable effort to self-medicate his overwhelming anxiety and depression, no one seems to have cared. By the time of his first meeting with Phillip Williams, Demarcus was simply bouncing from situation to situation, desperately seeking attachment and some remedy for the intense feelings of emptiness and worthlessness instilled by his childhood, but possessing no skills to form the healthy, mutual relationships that he so desired.

EVIDENCE OF IMPAIRMENT IN THE DEVELOPMENTAL PERIOD

66. Just as the impact of Mr. Sears's neurological damage and early environment was readily apparent during my interview with him, so are the effects of these insults apparent in his history.

* * * *

Pet. Ex. 3, HT 270:

68. Witness descriptions of Demarcus's behavior and personality reflect a child with marked impairments. In addition to the litany of witnesses who describe

Demarcus as slow and dilatory or simply odd, there are a number of telling themes. It is notable that the witnesses do not relate stories in which Demarcus in an active participant or the motivating force behind the events. Demarcus is instead always the child to whom things simply happen, or more often still, the child that is simply present. This reactivity is characteristic of a child with an impaired ability to interact with his peers and navigate his world. As the witnesses describe, Demarcus hung back and failed to play with the other children.

* * * *

Pet. Ex. 3, HT 271-275:

70. Demarcus was evaluated for learning problems and special services several times over the course of his childhood. The first time, in January 1981, he was referred because of a potential learning disability and/or academic underachievement. The examiner, Dr. Headlam, observed that Demarcus became easily frustrated and had an overbearing father with unreasonable expectations. A few weeks later, Demarcus was again referred for evaluation by his third grade teacher. The school psychologist not only observed that Demarcus was functioning below grade level in the classroom, but that Demarcus's poor direction-following and lack of self-confidence were interfering with his learning. The eighth grade brought yet another psychological service evaluation by the school system, this time following Demarcus's return to Cincinnati from North Carolina. His teacher noted problems in reading and English, as well as a deficits in attention, concentration and motivation. The evaluator again identified a learning disability, but, much like Demarcus's father, attributed his classroom problems to Demarcus's disinterest or unwillingness to do the work. (Records of Lincoln Heights Health Center; Records of Greenhills/Forest Park schools for Demarcus Sears).

71. When Demarcus reached high school, he was again diagnosed with a learning disability and placed in a Severe Behavioral Handicapped class because of the learning and behavioral problems he had by then been exhibiting for years. Demarcus came to his first class of the day agitated and required one-on-one attention from the teachers aide before he was calm enough to participate in class. The teachers and aides in the Behavioral Classroom again observed Demarcus's inability to concentrate or stay on task, but, not surprisingly, discovered that Demarcus improved when given the one-on-one attention and general affirmation he craved. Frank however, was displeased with Demarcus's progress, and Demarcus was mainstreamed at his insistence, with the expected disastrous result. (Records of Forest Park/Greenhills High School, Affidavit of Victoria Shephard Gough, Affidavit of Paula Neihaus).

72. Demarcus reports early drug use. He used marijuana and later a marijuana-cocaine mixture throughout high school. That he liked the pleasant

"mellowing" effect of the cocaine-marijuana mixture is a good indicator that he was (to some degree successfully) medicating his anxiety and self-esteem issues with illicit drugs. Therefore, his drug use offers another reflection of a history of anxiety, depression and personality disorder, as well as another potential etiology for his brain impairment. In addition, the substance use exacerbated the existing cognitive impairments yet further. (Interview with Demarcus Sears, Affidavit of Rodney Tillman, Affidavit of William Burns, Affidavit of Kenneth Burns, Affidavit of Marcus Holley).

73. Thus, there is little question that Demarcus's symptoms long pre-dated the crimes of October 1990. They in fact span his traumatic life and were observed by separate people over the course of different time frames and settings, their observations remarkable for their consistency.

IMPLICATIONS FOR FUNCTIONING

74. Just as the impact of the many physical and psychological insults Mr. Sears has suffered was apparent even in his functioning as a child, the impact of these multiple deficits is far more pronounced in his behavior as a adolescent, at a time when persons are expected to begin to exercise a capacity for more adult decision-making and judgment, and begin to better modulate their own emotions and behaviors. As stated at the outset, the combined effect of Mr. Sears's multi-faceted deficits - which in DSM-IV-TR diagnostic terms are best termed Cognitive Disorder NOS, Anxiety Disorder NOS (Mixed Anxiety-Depressive Disorder), and Personality Disorder NOS (Mixed type) -- is debilitating. The impact of these deficits acting in concert is far greater than the sum of each cognitive and psychiatric impairment existing alone. Each impairment exacerbates the others, leaving Mr. Sears substantially disabled under the best of circumstances. However, with the addition of even relatively minor stressors and unpredictable situations, Mr. Sears's functioning rapidly decompensates even further and purposeful behavior all but ceases entirely.

75. Mr. Sears's severely compromised cognitive ability — i.e. his impulsivity, inability to weigh alternatives, foresee probable outcomes and make reasoned judgments — makes it impossible for him to appropriately manage, or even to fully comprehend, situations that present the most minor obstacles. Compounding matters, his impulsivity and distorted perceptions themselves create problems where they otherwise would not have existed, so Mr. Sears finds himself confronted with perceived obstacles far more often than the average person.

76. Mr. Sears's inability to navigate basic obstacles and achieve a desired result overwhelms him and feeds his depression and self-questioning, which in turn feeds his tendency to engage in fantasy. In the end however, as a consequence of his traumatic early environment and biological hardwiring, Mr. Sears has little ability

to regulate his own emotions or cope with stress and anxiety, whatever psychic defense mechanisms he might attempt to employ. Stress and anxiety, particularly at levels such as exhibited by Mr. Sears, act directly upon the brain's executive centers. Even in persons of average neurological functioning, judgement and impulse control become impaired with extreme stress. Mr. Sears's depression, anxiety and erratic emotional states thus amplify yet further his profound cognitive inabilities, while the resultant additional impairment in cognitive functioning increases his frustration, stress levels, anxiety and depression, and so the cycle continues.

77. Mr. Sears's impulsive behavior, difficulty assessing situations, emotional instability and grandiose thinking present obvious challenges for interpersonal interaction and relatedness. As observed during my clinical interview, Mr. Sears has great difficulty maintaining a basic sense of connectedness and engagement which most of us take for granted during an interaction with another. His wildly unpredictable mood and tangential thinking make it all the more difficult for others to relate to him; while his inability to correctly assess a situation or appropriately respond to it impair his ability to relate to others. These deficits compound Mr. Sears mood lability by generating yet another source of frustration, stress, anxiety and depression, which again feed Mr. Sears's impulsivity and disorganized behavior.

* * * *

Pet. Ex. 3, HT 275-277:

79. It is not difficult to see how these deficits contributed to Mr. Sears's illogical behavior leading up to and including the kidnapping for which he stands convicted Because of their ill-planning, Mr. Sears and Mr. Williams found themselves along the side of the road far from home in a state in which they knew no one. The events that ensued are typical of the disorganized behavior and lack of forethought characteristic of Mr. Sears's history and disabilities. It seems that he and Mr. Williams essentially spent the weekend drifting from place to place, hitching rides and asking help from strangers with no apparent "plan," any efforts at obtaining the marijuana for which they purportedly came to Atlanta failing miserably. It appears that Mr. Sears at some point did manage to telephone his mother, but was refused any assistance. (Post-arrest statement of Demarcus Sears, post-arrest statement of Phillip Williams, Testimony of Phillip Williams, Affidavit of William Burns).

80. As time passed and they failed to find a way home or safe shelter, it is my opinion that Mr. Sears, predictably, became increasingly anxious and agitated. His affective and emotional dysregulation became overwhelming. His attachment deficits and feelings of abandonment and emptiness were directly implicated,

particularly after his mother again rejected a plea for help, and such feelings inescapably made his behavior more impulsive and disorganized and heightened his already overwhelming anxiety still further. It is my belief, to a reasonable degree of psychiatric certainty, that as his anxiety increased, his ability to identify his options, deliberate upon his choices and control his emotional impulses decreased accordingly, and fell considerably below the already abysmal levels reflected in Dr. Strickland's testing to a level of virtual non-existence. His best efforts to find a way back home involved stealing a car and placing the vehicle's owner inside the vehicle, and once confronted with the unforeseen (though obvious to persons without Mr. Sears's impairments) eventuality of having a kidnapping victim with which to contend, he had no ability to identify a way to extricate himself from the situation nor to mitigate the existing harm for everyone involved. It is my professional opinion that Mr. Sears's specific psychiatric, emotional and cognitive disturbances directly lead to the events of that weekend careening beyond his control.

3. EXCERPTS FROM HABEAS CORPUS HEARING TRANSCRIPT (Case No. 200-V-27; January 19, 2006)

HT 21:

Opening Statement

The live testimony that we're going to present today is going to focus on the absolutely crucial issue of the prejudice suffered by Demarcus Sears's trial defense because he was not evaluated by a psychologist in order to assist his trial lawyers. And the testimony is going to focus on the neuropsychological deficits and psychiatric disorders that impaired his judgment and his behavior when he participated in the kidnapping that resulted in his death sentence.

* * * *

Direct Examination of Dr. Strickland

[Dr. Strickland tendered as an expert in neuropsychology without objection at HT 21]

* * * *

HT 32:

Q. Do you have a professional opinion concerning, first, Demarcus Sears's neuropsychological capacities and functioning and, second, the etiology of those capacities?

A. Yes. I, after reviewing a large volume of records, have had the opportunity to evaluate Mr. Sears over a two day period, each day six to eight hours, so between 12 and 16 hours, reviewing numerous affiants' claims, pardon me, their particular insights into the patient, as well as the medical records I've reviewed earlier, administering a battery of neuropsychological tests that sample the geography of the brain. As a consequence of that evaluation, I have opined that the patient clearly has an anxiety disorder not otherwise specified. He has a cognitive disorder that's also not otherwise specified, meaning the criteria for cognitive disorder, he meets certain criteria in some areas and not criteria in other areas, but the cause of it is driven by a traumatic brain injury over his developmental life span and the intercession of that, drugs of abuse. And as a consequence, I saw that he had a drug dependence, but it was in remission due to his confinement status.

* * * *

HT 33-34:

Q. Do you have an opinion as to the nature of the brain injury?

A. Yes, I do.

Q. And what is the nature of the brain injury?

A. It is one that is focal, as we characterize it. It means a specific area. It is in the frontal lobe. It is documented via three affiants as having occurred on – he had three significant brain traumas. One I believe was at age, approximately age seven, when he was at a skating rink, struck his head and experienced a period of unconsciousness. The second time, he was struck in the frontal lobe with a golf club, that rendered him unconscious. And the last incident I recall was approximately age 15 or 16, when he was struck in the head with a hatchet. So, it's those particular traumatic brain insults, not mentioning the nature of individuals who abuse the volume of drugs that Mr. Sears had on a daily basis. He frequently would ingest these compounds to the point where they would pass out and would strike their heads, as well....

THE WITNESS: ...And the frontal lobes are very, very important and one's ability to plan behavior, first A, then B, then C, to shift set from one focused activity to another, to plan, I mentioned sequencing, and for autonomy and, most importantly, impulse control, your capacity to comport your behavior to the rules of society are largely governed from a neuroanatomic standpoint from this region here.

* * * *

HT 38-39:

Q. Does neuropsychology have an explanation for why somebody would test, you know, one percentile for Trail-Making Test B and the Stroop Color Inference Test and other, and yet show average intelligence and average memory and language skills?

A. Yes.

Q. And what explanation does neuropsychology have for that?

A. That there's a focal lesion and you would expect that pattern with a focal lesion. If you don't have a -- if you had a lesion in the temporal lobe, as I described earlier, and it was a focal lesion, you wouldn't expect deficits in other areas. In this particular instance, the performance for Mr. Sears was close to his expectation. . . .

A. . . . In this particular case it was overwhelmingly clear that his patient has a very focal deficient and it's very, very pronounced.

* * * *

HT 45-46:

By Mr. Edwards:

Q. Dr. Strickland, do you have an opinion about whether the deficits would be worse today than 15, 16 years ago or less pronounced today than 15 or 16 years ago?

A. That's a good question. I mentioned earlier that the frontal lobes continue to grow out to age 25, so with young individuals you expect there to be resolution of deficits in that area. If the patient is evidencing deficits now and they are as significant as they are now, that would suggest that if we just factor in the issue of temporal contiguity as close in proximity to the instant offense, they were obviously far more sever at that time, since presumably the patient has limited and hopefully no access to drugs of abuse while incarcerated and has had an opportunity, in a controlled environment, for the frontal lobes and the plasticity associated with the frontal lobes to optimize. So, that is clear and compelling, as far as I'm concerned.

Q. ...after your deposition, in getting ready to give your testimony today, did you review any additional or new additional information that you had not previously reviewed in preparing your reports?

A. Yes.

Q. What was that information?

A. Well, the variety of additional affidavits. There were the taped confession of Mr. Sears. There were some notes from, generated apparently from Mr. Sears throughout trial and related documents.

Q. And did those documents alter your opinion that you're giving today?

A No, they didn't.

Q. Were they pertinent, are they pertinent to the kind of opinion you're giving today?

A. Oh, I think so, yes.

Q. And why is that?

A. Because the content of the written communication was so bizarre, given the stakes of what was going on, it was confirmatory of the gross inability to comport behavior, the sort of impulsivity that I talked about previously, and the extraordinary poor judgment. So, it certainly validated this very significant and focal finding that I have described previously in terms of frontal lobe pathology.

* * * *

HT 73:

Cross-Examination of Dr. Strickland
By Mr. Helms [Counsel for Respondent]:

Q. And you just mentioned the substance abuse, and I guess that, did it cause it or did it exacerbate the problem? Is it one or the other?

A. In this particular instance it's exacerbation of the preexisting neural behavioral deficits.

Q. Okay. So, I mean, if you were testifying in front of a jury, then, in this particular case, let's say you were at trial suddenly and you were testifying for a jury, one of the things you would say, then, was that his drug abuse exacerbated the problem?

A. That is correct.

* * * *

HT 77-78:

MR. HELMS: Could I have a moment, Your Honor?

THE COURT: Yeah. Let me try a question. I'm trying to form it in my own mind, so I'm just going to say it as I'm thinking it, Dr. Strickland.

THE WITNESS: Yes, sir.

THE COURT: Head injuries may or may not produce the kinds of results that you have been testifying to here today?

THE WITNESS: Yes, sir.

THE COURT: But by taking some history of head injuries, coupled with the results of the tests that you've given, you can comfortably conclude that the results of the tests that you've given here were a consequence of frontal lobe head injuries?

THE WITNESS: Absolutely. And moreover, Your Honor, the patient has a lesion on the front of his head, which is something I can observe.

THE COURT: You used a strong word, "absolutely," when I asked that last question. Would the presence of head injuries, would that absolute be made more absolute, if that's possible --

THE WITNESS: Um-hmm.

* * * *

HT 80-82:

Q. Do you know if there's been any reports while he's been incarcerated that he has any frontal lobe damage? Aside from your own and Petitioner's other retained expert?

A. No. I am unaware of any such reports, specifically that staff here has diagnosed the frontal lobe pathology. Nor am I aware of any tests that were performed to ascertain as deficits.

Q. . . .Psychiatrists, I think you mentioned earlier, psychiatrists and psychologists I guess I should say – if you know the answer to this, you very well may not – but you described a moment ago for the court what a lay person would see, generally, with someone with frontal lobe –

A. Uh-huh (affirmative).

Q. -- effects or problems. Would it be fair to say that a psychiatrist or a psychologist would be able to denote those as well?

A. Yeah. I would think any competently trained clinician would be able to at least have numerous red flags in this particular case that would suggest that the patient, they wouldn't know it's frontal lobe but they certainly would know that something organic is operative and they should, in fact, send it to someone such as myself so that it can be identified and defined.

* * * *

HT 83-84:

Redirect Examination of Dr. Strickland
By Mr. Edwards:

Q. You asked a number of questions concerning your administration, neuropsychological protocols. Do working psychologists ever refer their patients to you?

A. Every day.

Q. And what are they referring their patients to you for?

A. To have issues of potential central nervous system pathology identified and clarified.

Q. Now, Dr. Strickland, you were asked some questions about what a general practitioner, at one point it was a lay person, but a general practitioner, general psychologist might see, and you responded that there would be to a general clinician there would be numerous red flags that would cause a

referral for a neuropsychological evaluation. What were the red flags that Demarcus Sears exhibits?

A. Well, starting off with, again, the developmental history, the evidence of learning disability, the problems with, again, the behavioral disinhibition, the very early onset of substance abuse, the reports of physical abuse, one does not know to what extent they involved, in terms of coupling, a potential head injury; the specific three significant head injuries that resulted in, two of which resulted in unconsciousness; the substantial use of substances, to include a very potent cerebral basal constrictive drug, to wit, cocaine; that, as well as observing the patient directly, collectively would have made any, in my opinion, competent clinician seek additional diagnostic clarification.

Q. What are the types of things observing directly would bring about a red flag with Demarcus Sears?

A. I think the sort of pace of speech, I would think that the, well, listening, the concreteness associated with problem solving, the aspects of sort of magical thinking, not necessarily psychiatric in nature, I think those are some examples.

* * * *

Direct Examination of Dr. Dudley

[Dr. Dudley tendered as an expert in psychiatry without objection at HT 93]

* * * *

HT 95-98:

Q. In terms of his mental status and thinking, how did Demarcus present himself to you?

A. I would say that there were several kind of prominent mental status findings. The most striking was in the area of cognition. . .And what was striking about that were difficulties in the realm of abstraction and decision making. I mean, what you would expect is the, when faced with a problem, the capacity to come up with alternative ways of addressing that problem, and that's what requires the capacity for abstraction, and then holding those options in your head and then based on what information you have weighing the pros and cons of those different options and making a decision that would be in your best interests. And that's what we'd call a kind of adult decision making process. And you expect us to, the capacity for this to kick in around the time of puberty, not that adolescents consistently make good decisions

but the capacity to do that becomes available to them. And what you see from people who don't have that is a much more concrete way of dealing with things that are not necessarily reasoned and considered and thought through.

Q. Where on that continuum was Demarcus?

A. Well, I mean, Demarcus wasn't evidencing that at all during the course of my interview of him. And even when we would talk about situations at different points in his life where he found himself in, and even when I would supply hypothetical alternatives to him, just to see whether he would process them, he had difficulty doing that.

Q Just to be clear, you said that he did not exhibit that any --

A. That capacity for, we call these kind of executive brain functions, okay? So, I can lump all that that I described as part of the kind of executive brain functions. So, what was lacking was the capacity for those processes that I was describing.

Q. Did he display insight into the facts that he lacked those capacities?

A. No. ....And there was also what I would call a labile mood. And what I mean by that is that his external representation of how he felt, his affect, would vacillate from neutral to depressed and not necessarily in relationship to the topics discussed. So, it wasn't like we suddenly started talking about something devastating and horrible and that would make him depressed. But you would see these rapid shifts in his mood just during the course of a conversation and the examination that I did.

So, there were these cognitive difficulties, this underlying level of anxiety, and this labile, lability of his affect or his mood during the course of the examination.

And then the other thing that was most striking, I would say, during the examination was the level of kind of a narcissistic sort of grandiosity that was evident throughout the examination and with stories and parts of his life that were just fantastical.

Q. Well, when you say "fantastical," you mean not realistic or –

A. Not realistic.

* * * *

HT 108-114:

Q. Do you have an opinion concerning Mr. Sears's capacity for sound decision making and reasoning both at the present time and at the time of the offense, and do you have an opinion as to the cause or causes of what you knew to be– the characteristics that you were able to identify concerning Mr. Sears?

A. Yes and yes.

Q. Would you state your opinion concerning his capacity for sound decision making and reasoning both now and at the time of the offense.

A. My opinion is that his capacity for sound reasoning and decision making is severely impaired.

Q. And would that be different now from at the time of the offense, in your opinion?

A. I suspect it's somewhat better now.

Q. Do you have an opinion as to the causes of that difficulty?

A. Yes. It's my opinion that there are several factors that contribute to the difficulty We start with the cognitive deficits that I described, in the sense of the difficulty with these executive functionings, which is the essence of decision making and reasoning and judgment, being so severely impaired and coupled with the impulsivity that I described. So, you have that factor.

The second factor is the underlying anxiety disorder mixed with the depression that has not only, that it's not only the result of what I discovered was a very difficult childhood and adolescence but also has genetic and biological contributing factors. So, you have that issue.

Then you have the third issue, which are these personality, the personality disorder and the difficulties associated with that, the abandonment issues, the self-esteem issues, the fantastical thinking, the grandiosity, all the factors that go to make up that personality disorder.

Now, what happens, of course, is that each of these three different difficulties feed each other and make each other worse. In other words, you already have a cognitive deficit and then the anxiety and the mood disturbance, of course, takes it own toll on cognition, thereby making the preexisting cognitive difficulties even worse. We also know that when people are under stress it also has its own effect on cognition. And the existence of the personality

disorder makes him particularly vulnerable to stress and certainly particularly vulnerable to certain sorts of stress....

Q. And was there anything pertinent in those education records that informed your view of the causation and development of these conditions?

A. Actually, there were several different things in the education records that were helpful. First of all, the education records revealed that throughout childhood and early adolescent years there were always concerns about learning and learning difficulties and those things. So, he was repeatedly set for different sorts of evaluations in that regard. And what kept coming up in those findings were underlying problems around anxiety and things like that, that are consistent with what we know from other, from Mr. Sears himself as well as other sources of information that was available.

Second, to the extent that those evaluations included contact with parents, and in most cases it was Mr. Sears's father, the observations that were made and the comments that were made about his father's behavior was consistent with the information I gathered from Mr. Sears, was consistent with the information I gathered from other sources of information, as was consistent with my own impressions when I met with Mr. Sears's father. And so that those records talked about just the way that he was treating Mr. Sears even at school, even in front of teachers, even in front of these evaluators, that was disconcerting to them and of concern to them.

And the third thing that comes up is the evidence that you would expect, is that when you get to the point developmentally where learning requires, assumes, you know, that the complexity of the things that you're learning assumes that these executive, the capacity of these executive functions have kicked in.

Q. And how does Demarcus's educational history comport with the continuum you just outlined?

A. It's consistent with that. I mean, the kinds of learning difficulties that he has over time.

Q. Did you have occasion to review his jail records?

A. Yes.

Q. And what of pertinence was in his jail records?

A. The kinds of write-ups and things and difficulties that he had were again consistent with what I have been describing, the kind of behaviors that you expect during kind of a latency age, early adolescent period, impulsive, not thought through, not making sense, not dangerous but just --

Q. You mentioned in describing your view about the causes a series of factors, some organic, some psychiatric interacting with each other, and that Demarcus would have a reaction to stress. Are you familiar with the factual setting of the crime that he was arrested for?

A. I believe I am.

Q. And is there anything about that factual setting that would be a cause of stress of a degree where he could decompose to the extent you've described?

A. I believe so, yes.

Q. And how is that?

A. Well, I think it's important to note that the problems that, as I mentioned earlier, the difficulties with anxiety and mood and the difficulties that I've described, his type of personality disorder set of issues, you know, also have their roots in just the difficulties that Demarcus had growing up, with the parents, the kind of absence of support and attention and bonding and attachment. I mean, real issues in that regard from both parents, some psychological and physical abusiveness from both parents, constantly kind of put down and humiliated, again from both parents. So, there was just a lot of, there was nothing particularly nurturing at all about his upbringing and no, none of the kinds of things that are needed for healthy development of the self, and coupled with actually abusive sorts of, psychologically and physically abusive things, as well.

So, I say that to say it's not surprising there at this point that you not only have, you know, self-esteem issues but, you know, issues around abandonment, issues about not being cared for, the kinds of issues that he has, through which he's been trying to defend with these narcissistic things that I was describing earlier.

So, what I said earlier is also pertinent, which is that his defense is just denial. This grandiosity is a very fragile defense and it's easily broken down. And that's in part what contributes to the labile mood, when those defenses fall apart, then the underlying feelings about yourself break through and the mood vacillates and the anxiety vacillates accordingly.

So, you have these underlying cognitive deficits that interfere with planning and judgment and thinking and making good decisions and organizing things, hence you find yourself in the situation that was not thought through, that you haven't thought about how this is really going to work out, that you haven't thought what to do if there's a problem. And so you're stuck, you know, down here without a way home, without having achieved a not particularly well thought through plan in the first place. You call home for assistance and you don't get it, which again stirs up all those same issues that have been a part of his whole life, in the sense of the rejection by the parents, the lack of support, and then you don't have the capacity to kind of think through what your options might be now that you're in this situation. So, you impulsively make decisions about what to do and all of that just keeps building up, in essence, a more and more stressful situation, given his underlying neuropsychiatric and psychiatric problems.

APPENDIX D

SUPREME COURT
OF GEORGIA
FILED

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IN THE SUPREME COURT OF GEORGIA

DEMARCUS A. SEARS, Petitioner,	)	APPLICATION NO. _____
vs.	)	Superior Court of Butts County Case No. 2000-V-27
HILTON HALL, Warden, Respondent.	)	HABEAS CORPUS

APPLICATION FOR

CERTIFICATE OF PROBABLE CAUSE TO APPEAL

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IN THE SUPREME COURT OF GEORGIA

DEMARCUS A. SEARS, Petitioner,	)	APPLICATION NO. _____
vs.	)	Superior Court of Butts County Case No. 2000-V-27
HILTON HALL, Warden, Respondent	)	HABEAS CORPUS

APPLICATION FOR CERTIFICATE OF PROBABLE CAUSE TO APPEAL

Pursuant to O.C.G.A. § 9-14-52(b) and Georgia Supreme Court Rule 36, Petitioner Demarcus A. Sears respectfully applies to this Court for a Certificate of Probable Cause to Appeal from the Final Order and judgment of the Superior Court of Butts County ("Habeas Court") entered January 7, 2008 in the case numbered 2000-V-27 ("Order"; Attachment A hereto), which denied Mr. Sears's Amended Petition for Writ of Habeas Corpus. Mr. Sears filed a timely Notice of Appeal in the Superior Court of Butts County on or about January 23, 2008. This Court has granted Mr. Sears both an extension of time to file this application and an expansion of its page limitation. (Attachment B hereto).

Mr. Sears seeks relief from an Order of the Habeas Court below that misreads a prior decision of this Court and applies patently incorrect legal standards to deprive him of due process of law. The Habeas Court first erred in refusing to address the

Id. As the court correctly observed, "without seeking that information *it cannot be said that counsel's decision to withdraw the motion for evaluation was a reasonable strategic decision.*" Id. (Emphasis added.) In sum, the Habeas Court correctly identified and applied governing legal principles to reach the conclusion that Trial Counsel provided constitutionally deficient performance in their representation of Mr. Sears at the sentencing phase of his capital trial.

B. The Habeas Court Erred in Applying a Standard for Determining Prejudice That Is Directly Contrary to the Precedent of This Court and the United States Supreme Court

While the Habeas Court correctly assessed Trial Counsel's performance as deficient, it inexplicably found that "the record is largely silent" as to what mitigating evidence Mr. Sears would have shown had his counsel conducted a reasonable investigation. (Order at 28.) The court echoes that statement later in the Order, asserting that "[n]o one knows what would have been found with a reasonable investigation, and that is not the focus here." (Order at 29.) This finding is belied by the record below. The bulk of the record before the state habeas court was composed of the ample mitigating information that a reasonable investigation would readily have discovered.[3] As that evidence demonstrates, a complete and accurate account of Mr.

[3]While correctly determining that trial counsel performed deficiently, the state habeas court also states that "strategic choices made after less than a complete investigation

Sears's life would have offered his jury insight into how he came to play his part in the events underlying this case and would have provided a foundation for the mental health evidence counsel should have presented. As effective trial counsel could have demonstrated, Mr. Sears grew up in a home poisoned by the violent and acrimonious marriage of his parents, each of whom was psychologically-damaged and ill-equipped to raise children. As a result, Mr. Sears was often neglected, insulted, subjected to abusive physical discipline and left unprotected from the sexual abuse of extended family members. The record also contains records and testimony demonstrating Mr. Sears educational impairments, as shown his twice repeating second grade, his classification as learning disabled, and his two withdrawals from high school. (P. Ex. 9 at HT 526, 531.)

1. The Record Contains Abundant Evidence of Mr. Sears's Damaging Childhood Environment and his Debilitating Mental Impairment

A reasonable investigation would have revealed that the difficult backgrounds of Mr. Sears's parents, Frank Sears Jr. and Virginia Squire Sears, left them with "deep-seated characterological problems and near-total inabilities to bond with one another or with the children their marriage produced, or to foster a stable living environment." P. Ex. 3 at HT 249-250. The evidence before the Habeas Court establishes that both

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may be reasonable . . . ." (Order at 29). As will be further elucidated below,. this is

Petitioner's father, Frank Sears, and his mother, Virginia Sears, were themselves the products of childhood homes plagued by violence, alcohol and adultery. (Id. at HT 1618; P. Ex. 18 at HT 1612.)

Petitioner's father Frank enlisted in the United States Army at age seventeen and served in Vietnam. While training as a paratrooper, he broke his back in an accident that killed two of his comrades. (Id; P. Exs. 14 at HT 1105-1143; 19 at HT 1618-19; 15 at HT 1453, 1457.) Paraplegic at age nineteen, Frank was sent to rehabilitate in a Veterans Hospital in Richmond, Virginia, where he met Mr. Sears's mother, Virginia Squire, a nurses' aide. Virginia had just ended her relationship with her first serious boyfriend, whom she had attacked with a razor after he struck her, inflicting a cut that required thirty-eight stitches. (P. Ex. 22, HT 1645.)

Frank proposed to Virginia after only a few weeks. P. Ex. 3, HT 252. Virginia agreed to the marriage on the condition that Frank "give [her] all the material things she wanted." P. Ex. 22 at HT 1646. They settled in Richmond. Id.; P. Ex. 19 at HT 1619. Despite Virginia's belief that she was not ready to have children, she became pregnant soon after their marriage with Demetrius Sears, who was born in December 1970. Mr. Sears was born just eleven months later. P. Exs. 5 at HT 499; 19 at HT 1619, 1623; 22 at HT 1647. As Frank worked long hours and Virginia admittedly had

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the very antithesis of Supreme Court precedent.

no interest in child care, neither parent gave appreciable attention to Mr. Sears when he was an infant. *Id.* at HT 1620-21; P. Ex. 22 at HT 1647. Petitioner's father testified that as an infant Petitioner was a "trifling parent's delight" because of his lethargy and infrequent crying. P. Ex. 19 at HT 1619.

The evidence presented to the Habeas Court demonstrated the complete incompatibility of Mr. Sears's parents, with Virginia testifying that "sex was [their] only common interest." P. Exs. 18 at HT 1613; 20 at HT 1632; 21 at HT 1637; 23 at HT 1662; 22 at HT 1646. The evidence establishes that as Frank had not dealt with the emotional aftermath of either his upbringing or his injury, he set out to demonstrate that he could do anything any able-bodied man could do, which psychiatric examination revealed was part of "a life-long vacillation between utter invincibility and abject helplessness." P. Ex. 19 at HT 1619; 3 at HT 251; 18 at HT 1613, 20 at 1631-1632. While Frank wanted to bond with his children, he had "no real capacity to express emotions or establish connection," and exhibited a number of depressive symptoms. P. Ex. 3 at HT 255-256. While witnesses describe Virginia as bubbly and charismatic, she displayed such "grossly narcissistic" behavior that one of Mr. Sears's experts had difficulty persuading her to pause in her "lengthy narratives of her own suffering" and "focus on her son long enough to recite his basic medical, psycho-social

and academic history." Id.

Frank and Virginia's turbulent and violent relationship saw Frank make cruel and embarrassing comments about his wife – including telling her brother that he "never would have married a bitch like Virginia if he had not been in a wheel chair," while Virginia minced no words to spare her husband's feelings, was inappropriately flirtatious, and openly conducted extra-marital affairs. P. Exs. 20 at HT 1633; 21 at HT 1637-1638; 22 at HT 1647; 27 at HT 1689-90; 28 at HT 1693. Petitioner's parents' frequent arguments would regularly devolve into "screaming-knock-down-drag-out-fights" that were witnessed by the children. P. Exs. 21 at HT 1639; 24 at HT 1667; 26 at HT 1676-77, 1679. Although confined to a wheelchair, the agile and athletic Frank manhandled Virginia and sometimes dragged her around by the hair. P. Exs. 26 at HT 1679; 32 at HT 1717; 22 at HT 1649. Petitioner's brother testified to one "particularly crazy fight when I was maybe 7 or 8 years-old . . . . I remember watching them scream and fight, and at some point, my father just snapped. He came at my mom and she screamed for me to get a knife." P. Ex. 26 at HT 1676. Following a brief separation, Mr. Sears's parents reconciled and moved the family from Richmond after learning that Frank would be transferred there in connection with his job. Id. Mr. Sears was seven years old.

Evidence also suggests that Mr. Sears was sexually abused by the eldest of his maternal cousins, Anthony, who babysat Mr. Sears and the other children in the family when Mr. Sears's mother and her siblings socialized. P. Exs. 24 at HT 1665, 1667; 26 at HT 1681; 28 at HT 1696; 29 at HT 1700; 30 at HT 1704. Mr. Sears's older brother testified in the Habeas Court that his cousin was a "complete pervert" who used various ruses to molest the children, including inviting them to sit on his lap while playing video games so that he could rub his erect penis against them and suggesting that they play "hide and seek" so that he could lure them into a closet and touch them. P. Ex. 26 at 1681-1682; see also P. Exs. 25 at HT 1671; 25 at HT 1672; 26 at HT 1682. Although the family moved to Nevada when Mr. Sears was seven years old, they visited Richmond regularly enough to give Anthony multiple opportunities to abuse him further. P. Exs. 20 at HT 1633; 22 at HT 1648; 25 at HT 1671; 26 at HT 1680.

Petitioner attended the second grade in Nevada as Frank became mired in work and Virginia gambled and partied, despite giving birth to twin girls. P. Exs. 6 at HT 500-01; 22 at HT 1649; 26 at HT 1676; 19 at HT 1621. When Frank accepted a position near Cincinnati, Ohio, after just a year, the family moved again. P. Ex. 22, HT 1649. By this time, however, Mr. Sears's performance in school had lagged so badly that he repeated the second grade. P. Exs. 6 at HT 500-01; 22 at HT 1651. His

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cognitive impairment and unhealthy home environment had manifested by the time he entered the third grade, as his teachers suspected a learning disability and referred him for evaluation at the Lincoln Heights Health Center. P. Exs. 7 at HT 502-511; 9 at HT 541-551. As documented in the records from Mr. Sears's school and the Health Center document – records that the Habeas Court found Trial Counsel did not gather – the nine-year-old Mr. Sears lacked self-confidence and struggled to follow directions, with the examiner noting that Mr. Sears's "overbearing" father had "unrealistic expectations" for his learning-disabled son. P. Exs. 7 at HT 505, 508; 9 at HT 546. The violence and acrimony between Mr. Sears's parents escalated to the degree that their children remember fighting as their only interaction, with Frank sulking while Virginia went out with friends. P. Exs. 19 at HT 1624; 21 at HT 1639; 32 at HT 1713; 33 at HT 1721.

Both parents also adopted disciplinary styles that proved detrimental to Mr. Sears's development. The exacting Frank drew upon his military training for bizarre and inappropriate punishments, once requiring a ten-year-old Mr. Sears and his brother to "dig a hole in the backyard in the precise dimensions of a piece of glass they'd broken in the house," while also drilling them in sports and giving them age-inappropriate household chores. Petr. Exs. 3 at HT 263-264; 19 at HT 1622; 20 at HT

1631; 21 at HT 1638; 25 at HT 1670; 76 at HT 1677; 30 at HT 1702. Frank also beat Mr. Sears and proved particularly unforgiving of his son's emerging cognitive disabilities, accusing his son of being lazy and unmotivated. P. Exs. 19 at HT 1620-22; 22 at HT 1651, 1653-54; 32 at HT 1715. As a result, Mr. Sears developed an intense fear of his father, with witnesses recalling that "you only had to look at Demarcus to see how frightened [of Frank] he was." P. Exs. 19 at HT 1622; 25 at HT 1670.

Virginia in turn subjected the children to inconsistent outbursts, frequently screaming obscenities at them in a manner that "attack[ed] the individual, not the issue," and beating them, often with objects. P. Exs. 27 at HT 1690; 18 at HT 1614; 25 at HT 1669; 26 at HT 1677; 33 at HT 1721; 22 at HT 1651; 28 at HT 1694; 32 at HT 1715. Witnesses to her behavior report that she long expressed a preference for Mr. Sears's brother, Demetrius, and consequently tolerated his poor behavior while subjecting Mr. Sears to more frequent and intense tirades and beatings. P. Exs. 31 at HT 1706; 32 at HT 1716. Virginia herself admits that the beatings she gave Mr. Sears "were memorable." P. Ex. 22 at HT 1651.

In 1983, Virginia filed for divorce from Frank, citing gross neglect of duty, and took all four children to live in North Carolina with her new boyfriend, who proved to be a violent alcoholic. P. Exs. 13 at HT 1095; 19 at HT 1624; 20 at HT 1633; 21 at HT

1640; 22 at HT 1654-55; 25 at HT 1672; 32 at HT 1717; 33 at HT 1722. While Virginia indulged in partying and fighting, she left Mr. Sears, then in seventh grade, and his brother to their own devices. P. Exs. 21 at HT 1640; 22 at HT 1654-55; 25 at HT 1672; 32 at HT 1717; 33 at HT 1722. When Virginia tired of this arrangement, she called Frank, who drove to North Carolina to bring her and the children back to his home near Cincinnati. P. Ex. 19 at HT 1625. Mr. Sears's parents never remarried.

The records introduced before the Habeas Court prove that when Mr. Sears returned from North Carolina, educators in Ohio again noted his learning difficulties and referred him for evaluation. P. Ex. 9 at HT 542-43. Records from this period – which again trial counsel did not obtain – document Mr. Sears's continued academic struggles and his deficits in attention, concentration and motivation. Id. Following another evaluation, Mr. Sears was placed in the Severe Behavioral Handicap Unit (SBHU), which was established "to serve students with clinically diagnosed emotional/mental disorders, sociopathic tendencies or those who exhibit behaviors indicating the presence of such conditions." P. Ex. 34B at HT 1736. Mr. Sears's teachers noted that he arrived highly agitated for the first class of each day and required substantial one-on-one attention to quell the anxiety that his home life seemed to induce. P. Exs. 34-A at HT 1728; 36 at HT 1741, 1743. When school officials

called Frank to the school to discuss solutions for Mr. Sears's continued academic struggles, they witnessed Frank excoriate Mr. Sears. One teacher who attended "to explain to Demarcus's father how talented Demarcus was, and to discuss how we could use the possibility of a career in art to motivate Demarcus" remembered the meeting as follows:

> After hearing what I and the other teachers had to say, Demarcus's father began to berate Demarcus in front of all of us. I'll never forget the way he yelled at him. Mr. Sears was so verbally abusive and made such a scene, that it made everyone in the room uncomfortable. I recall looking at the floor to avoid making eye contact with either Demarcus or his father. I felt so bad for Demarcus, he just sat there and took it - he didn't say one word the entire time he was being yelled at.

P. Ex. 37 at HT 1746-47. Following this meeting, Frank insisted on removing Mr. Sears from the SBHU, a result that one educator described as a "disaster." P. Ex. 37; see also P. Exs. 36 at 1743; 34-A at HT 1729.

By this point in Mr. Sears's development, his household was characterized by gross permissiveness. P. Ex. 26 at HT 1683-84. Frank, who typically returned from work and proceeded straight to his room, ignored the fact that Mr. Sears's older brother was firmly entrenched in the drug trade, even selling and cooking drugs in the Sears home, while Virginia merely siphoned the drug profits for her own use. P. Exs. 26 at HT 1684-85; 28 at HT 1693, 1695-96; 30 at HT 1702; 32 at HT 1713; 38 at HT 1752.

Mr. Sears would eventually abandon high school on two separate occasions and seek physical and emotional escapes from his difficult existence. P. Ex. 9 at HT 526, 531. Witnesses describe Mr. Sears as living in his own world, drawing for hours at a time. P. Exs. 30 at HT 1701; 32 at HT 1710. He also turned to marijuana and a marijuana and cocaine mixture called "primos". P. Exs. 1 at HT 150; 32 at HT 1707; 38 at HT 1752. It was at this vulnerable time that Mr. Sears was befriended by Phillip Williams, an equally troubled young man with a history of delinquency.

As outlined in great detail in Section IV, *supra*, adequate performance by counsel would have also revealed that by the time Petitioner met Phillip Williams, he was laboring under the effects of grave cognitive impairments and a psychiatric disturbance. The record in the Habeas Court is replete with uncontroverted evidence that Petitioner suffered at the time of the offense from substantial brain damage that would impair his judgment that would have been detected had Petitioner been properly evaluated at the time of his arrest and detention for trial. That evidence establishes that not only would Mr. Sears serious cognitive impairment and emotional instability have been captured on tests administered early in his incarceration, they likely would have been more profound deficits. (P. Ex. 1 at 5). Any traditional psychiatric evaluation of Petitioner would have similarly uncovered the pronounced psychiatric artifacts of his

traumatic family environment.

2. The Prejudice Resulting from Trial Counsel's Failure to Investigate and Present this Ample Mitigating Evidence Is Plain

Trial counsel's failure to investigate prejudiced Mr. Sears at the penalty phase of his trial in a number of ways. The primary purpose of the penalty phase of a capital trial is to insure that the sentence is reliable by focusing upon the particularized characteristics of the defendant. Woodson v. North Carolina, 428 U.S. 280, 305 (1976). The jury should have "as much information before it as possible when it makes a sentencing decision," in order to "give a reasoned moral response to the defendant's background, character and crime." Barnes v. State, 496 S.E.2d 674, 688 (1998) citing Gregg v. Georgia, 428 U.S. 153, 204, Penry v. Lynaugh, 492 U.S. 302, 327 (1989).

The Supreme Court has repeatedly held that counsel's duty under Strickland must be measured by reference to the unique requirements of capital sentencing, and therefore must encompass a thorough investigation of the defendant's life history. Williams, 529 U.S. at 398-99; see also Strickland, 466 U.S. at 691 (counsel has "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary"). The Court has found prejudice in counsel's failure to compile such as a history, as "the graphic description of [Petitioner's]

childhood, filled with abuse and privation . . . might well have influenced the jury's appraisal of his moral culpability." *Id.* at 398; *see also Wiggins*, 539 U.S. at 534 (capital counsel has affirmative duty to conduct reasonable investigation of client's background).

Though the Habeas Court chose a different measure, the Supreme Court has held that when determining whether counsel's failure to investigate relevant mitigation has prejudiced the defendant, "[i]f the undiscovered mitigating evidence, taken as a whole, might well have influenced the jury's appraisal of [Petitioner's] culpability," then the deficient performance of the Petitioner's attorneys mandates reversal of his death sentence. Rompilla, 125 S.Ct. at 2459. With regard to the penalty phase of a capital case in a state like Georgia, where non-unanimity on a death verdict results in a life sentence, the question becomes whether there is "a reasonable probability that at least one juror would have struck a different balance." Wiggins, 539 U.S. at 537; see also Martin v. Barrett, 279 Ga. 593, 619 S.E.2d 656 (2005). Quite contrary to the Order below, Petitioner's burden is only "to show only 'a reasonable probability' of a different outcome, not that a different outcome would have been certain or even 'more likely than not." In Mr. Sears's case readily meets that objective standard.

Trial counsel's failure to investigate resulted in the imposition of a death

sentence by a jury unaware of Mr. Sears's upbringing in a chaotic and abusive environment that impaired his development and ability to conform to social norms and exacerbated the disabilities that affected his learning and conduct. As the Supreme Court has noted, the jury should have heard this evidence "because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring). Indeed, the Supreme Court has found such evidence so compelling as to undermine confidence in the jury's verdict even in cases where substantial aggravating evidence exists. See, e.g., Williams, Wiggins, Rompilla.

The undiscovered mitigation in this case would also have neutralized much of the State's presentation in aggravation, which capitalized upon trial counsel's portrayal of Mr. Sears as a "normal teenager" from a loving home who turned his back on his advantages and chose to commit a brutal crime. TT 2373-2376. Trial Counsel presented the testimony of seven witnesses garnered during their day in Ohio. The only family member among them was Petitioner's mother. On cross examination of these witnesses, the State successfully elicited that Mr. Sears was given many material

advantages, including a comfortable home and the opportunity for an education[1] – information the State would emphasize throughout its closing argument. (Id. 2473-75).

3. The Habeas Court Did Not Recognize the Prejudice Flowing From Counsel's Deficient Performance Because it Applied An Improper Standard for Determining Prejudice

After finding that no reasonable counsel would have acted as Mr. Sears's trial counsel did in their litigation of his Sabel claim and their penalty phase investigation, the Habeas Court found no prejudice to Mr. Sears. In so ruling, the Habeas Court applied standards for determining prejudice that bear no resemblance to those prescribed by the Supreme Court of the United States or this Court. Indeed, while the court correctly observed that "[t]he law places a heavy burden on a defendant attempting to show prejudice," Order at 30, its decision frames a standard that increases Mr. Sears's burden to the point that neither he nor any other petitioner could ever hope to meet it.

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[1] Mrs. Sears admitted during her testimony that her son had "enough money to buy a lot of clothes" and that "the children's father has always provided them with a bank account since they were day one, so they had money in the bank [a]nd they were given access to take out money for certain things." (TT 2391). Mrs. Sears also told the jury that she lived in a nice, middle class neighborhood and that the Searses worked very hard and bought their own home. (TT 2394, 2395). The jury heard that Petitioner's father coached the boys in football, that his parents were good parents to him, and that Mrs. Sears encouraged him to go to school. (*Id.* 2395). She testified that families in her neighborhood owned automobiles and boats, and that Petitioner was not underprivileged. (*Id.* 2396).

The Habeas Court declined to find that the thoroughly ineffective performance of Mr. Sears's counsel had caused him prejudice because "[i]t is just not possible to know what effect a different mitigation theory would have had" upon Mr. Sears's jurors. (Order at 30). In essence, the Habeas Court ruled that Mr. Sears's claim must fail because he cannot prove that his jury would have recommended life had his trial counsel met their constitutional obligations and presented the available mitigating evidence.

The Habeas Court thus not only failed to identify the correct standard, but proffered a standard that would effectively foreclose relief for any ineffective assistance of counsel claim. The correct standard for determining prejudice – as promulgated by the Supreme Court of the United States, and utilized by this Court – states that a defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. Petitioner's "burden is to show only 'a reasonable probability' of a different outcome, not that a different outcome would have been certain or even 'more likely than not.'" Martin v. Barrett, 279 Ga. 593, 619 S.E.2d 656 (2005) citing Schofield v. Gulley, 279 Ga. 413, 614 S.E.2d 740 (2005).

The Habeas Court's standard resembles this standard in neither language nor

implication. A standard that would allow a finding of prejudice only when it is "possible to know what effect a different mitigation theory would have had" upon a petitioner's jury would by definition prohibit finding prejudice. Mr. Sears does not dispute that neither the Habeas Court, nor he, nor anyone else could possibly know what the outcome of his trial would have been had it proceeded in such a different fashion. Petitioner contends that this very impossibility reveals the error in the Order's analysis of his claim. As this standard is clearly erroneous[4], this Court should grant review.

In further stating that Mr. Sears's case "cannot be fairly compared with those where little or no mitigation evidence is presented and where *a reasonable prediction of outcome can be made*," the court again reveals its misunderstanding of the applicable prejudice standard. (Order at 30)(emphasis added). The Supreme Court has not reserved relief for those cases in which the habeas court feels it can reasonably make a retrospective "prediction" of what the long-since-determined outcome of a trial would have been, if only trial counsel had met their obligations. The Supreme Court has quite deliberately crafted a standard free of this prognostication, one that directs

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[4] To establish that the state habeas court has identified the improper standard, one need do nothing more than revisit the decisions in which the Supreme Court has granted relief for ineffective assistance of counsel. See, e.g., Wiggins, Williams, Rompilla. None of the petitioners in these cases would meet the burden imposed by

courts to grant relief not only when they are confident that the defendant's trial would have had a different outcome, but also when counsel's ineffectiveness has undermined their confidence in the outcome that did in fact occur. Strickland, 466 U.S. at 694. By allowing relief when there is a reasonable probability of prejudice, the proper standard recognizes the limits of retrospect and adopts the protection of the defendant's constitutional rights as its organizing principle. The standard offered by the Habeas Court would leave petitioners with no means of redress.

The Habeas Court went on to hold that Mr. Sears could not show prejudice because "although [Mr. Sears's] counsel failed to investigate thoroughly, they did develop a reasonable mitigation theory with evidence to support it." (Order at 30). The Order appears to advance a standard that excuses counsel from their constitutional obligation to conduct a thorough investigation so long as they stumble upon any evidence that is arguably mitigating. This logic contradicts the Habeas Court's own conclusions in assessing the performance of Mr. Sears's trial counsel. If counsel meets their constitutional obligations whenever they "put forth a reasonable theory with supporting evidence," then the behavior of Mr. Sears's counsel that the state habeas court found inadequate – namely, meeting once with a few members of Mr. Sears's family and asking them for "good things" about him – would suffice. The Supreme

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the state habeas court.

Court of the United States has held that it does not; the purpose of the penalty phase is not to ensure that the jury hears random positive facts about a defendant but to focus the attention of the jury on the particularized characteristics of a defendant necessary to insure that the sentence is reliable. Woodson v. North Carolina, 428 U.S. 280, 305 (1976). As this Court has noted, the jury should have "as much information before it as possible when it makes a sentencing decision," in order to "give a reasoned moral response to the defendant's background, character and crime." Barnes v. State, 496 S.E.2d 674, 688 (1998) citing Gregg v. Georgia, 428 U.S. 153, 204, Penry v. Lynaugh, 492 U.S. 302, 327 (1989).

Here, Trial Counsel not only failed to provide his jury with the most extensive and compelling information in mitigation, but the information Trial Counsel did present left the jury with the misimpression that he was brought up in a home that provided "every advantage." This Court has held that while counsel is afforded deference in selecting a trial strategy, its decision "must be reasonably supported and within the wide range of professionally competent assistance." Turpin v. Christenson, 497 S.E.2d 216 (1998). This Court has stated emphatically that before selecting a strategy, "counsel must conduct a reasonable investigation into the defendant's background for mitigation evidence to use at sentencing," Christenson, 497 S.E.2d at

225, citing Jefferson v. Zant, 263 Ga. 316, 319-20, 431 S.E.2d 110 (1993); see also Turpin v. Lipham, 510 S.E.2d 32, 40 (1998)(same).

Finally, the Habeas Court improperly minimized compelling evidence in support of Mr. Sears's argument for prejudice, namely that one juror acceded to a sentence of death only after three days of deliberations, numerous charges from the trial court, and coercion and threats from her fellow jurors. (Order at 30). On Mr. Sears's direct appeal, this Court felt sufficiently troubled by these circumstances to remand for further factual development, and three members of this Court ultimately concluded that the juror's fellow jurors had coerced her into changing her verdict. Sears v. State, 268 Ga. 759, 493 S.E.2d 180 (Ga. 1997); Sears v. State, 270 Ga. 834, 514 S.E.2d 426 (Ga. 1999). The Habeas Court characterizes these events as "the difficulty one juror was having reaching the same verdict as the others . . ." (Order at 30). The Order does not assess the significance of the fact that this juror resolutely supported a sentence of life even without the mitigating evidence that would have resulted from an effective mitigation investigation. The fact that one of Mr. Sears's jurors attempted "to strike a different balance" in spite of trial counsel's deficient performance could well serve to undermine confidence in the outcome of his trial, as there is a more than reasonable probability that the mitigation presentation made in the proceedings below would have

buttressed the juror's opposition to a sentence of death. As the Supreme Court has recently instructed, had the Habeas Court applied the proper prejudice standard, the prejudice would have been plain:

> This evidence adds up to a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury, and although we suppose it is possible that a jury could have heard it all and still have decided on the death penalty, **that is not the test.** It goes without saying that the undiscovered 'mitigating evidence, taken as a whole, 'might well have influenced the jury's appraisal' of [Rompilla's] culpability,' *Wiggins*, 539 U.S. at 538 (quoting *Williams v. Taylor*, 529 U.S., at 398), and the likelihood of a different result if the evidence had gone in is 'sufficient to undermine confidence in the outcome' actually reached at sentencing, *Strickland*, 466 U.S., at 694.

(emphasis added). Rompilla v. Beard, 125 S. Ct. 2456, 2469 (2005).

Given the jury's tremendous struggle to agree upon a sentence for Mr. Sears in the instant case, there can be no doubt that "the undiscovered mitigating evidence, taken as a whole, might well have influenced the jury's appraisal of Petitioner's culpability . . . and the likelihood of a different result if the evidence had gone in is sufficient to undermine confidence in the outcome actually reached at sentencing." (*Id.*) Applying this objective test, the conclusion is easily reached that reasonable jurors would have been affected by evidence of a traumatic upbringing and brain pathology that impairs Petitioner's ability to conform behavior to the rules of society

and that reasonable jurors would likely consider such evidence to weigh heavily against the death penalty.

As Trial Counsel performed deficiently at the penalty phase of his trial and that performance undermined confidence in its outcome, the Habeas Court's decision is contrary to law and this Court must grant review.

VI. STATE AND FEDERAL CONSTITUTIONAL PRINCIPLES PROHIBIT THE APPLICATION OF THE DEATH PENALTY TO A PERSON WHO WAS EIGHTEEN AND IMPAIRED AT THE TIME THE OFFENSE

As Mr. Sears's severe cognitive impairments and mental illness render him the functional, moral, legal and constitutional equivalent of an offender whose culpability is limited by mental retardation or youth, his execution would violate his rights as guaranteed under Article I, § 1, 1, 2, 3, 4, 5, 9, 14, 15, 16, 17, 18 of the Constitution of the State of Georgia, and the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. The Supreme Court of the United States has held in two recent cases that the execution of the mentally retarded, Atkins v. Virginia, 536 U.S. 304 (2002), and juvenile offenders, Roper v. Simmons, 543 U.S. 551 (2005), violates the Eighth Amendment, as the diminished capacities of the mentally retarded and the undeveloped minds of adolescents mitigates their culpability to the degree that their executions would not further the legitimate goals of capital punishment. As Mr.

VIII. REVIEW SHOULD BE GRANTED ON ADDITIONAL GROUNDS[3]

A. The Order Erroneously Ruled That Mr. Sears Has Procedurally Defaulted A Number Of His Claims.

In finding a number of Mr. Sears's claims procedurally defaulted, the habeas court has ignored Mr. Sears's contention that his counsel provided ineffective assistance in failing both to perfect the record adequately concerning the issues presented in these claims and to pursue those issues on behalf of Mr. Sears.

CLAIM III of Mr. Sears's amended petition, which concerns the trial court's denial of his post-trial motion for funds to retain a psychologist, Order at 17;

CLAIM IV of Mr. Sears's amended petition, which concerns the State's concealment of material evidence and presentation of false testimony, Order at 17;

CLAIM XI of Mr. Sears's amended petition, which concerns the trial of Mr. Sears while he was incompetent, Order at 17;

CLAIM XII of Mr. Sears's amended petition, which concerns the fact that Mr. Sears's execution would violate the Eighth and Fourteenth Amendments to the United States Constitution and the Georgia Constitution because his disabilities and mental illnesses both presently and at the time of the crime, are the functional, moral, legal and constitutional equivalent of a person who has not yet attained the age of eighteen or is mentally retarded, Order at 17;

CLAIM XIII of Mr. Sears's amended petition, which concerns the lack of uniform standards for seeking the death penalty throughout the State of Georgia, Order at 18;

CLAIM XV of Mr. Sears's amended petition, which concerns the discriminatory

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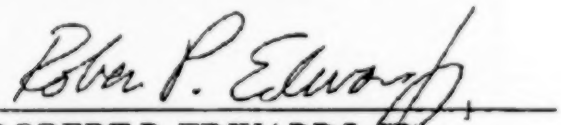
[3] To the extent that the habeas court found any of Mr. Sears's claims barred as *res judicata*, Mr. Sears asserts that the presentation of both new facts and new law permitted their litigation before the habeas court.

This the 8th day of April, 2008.

Respectfully submitted,

TROUTMAN SANDERS, LLP



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IN THE SUPREME COURT OF GEORGIA

DEMARCUS A. SEARS, Petitioner,	)	APPLICATION NO. _____
vs.	)	Superior Court of Butts County Case No. 2000-V-27
HILTON HALL, Warden,	)	
Respondent.	)	HABEAS CORPUS

CERTIFICATE OF SERVICE

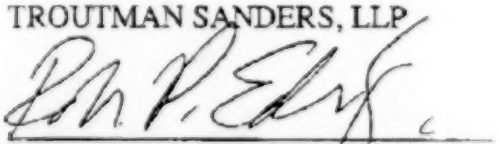
I hereby certify that I have served a copy of the foregoing Application for Certificate of Probable Cause to Appeal upon Respondent by depositing a copy of same in the United States Mail, with proper first class postage affixed thereto, addressed as follows:

Ms. Emily Roselli
Senior Assistant Attorney General
40 Capitol Square, SW
Atlanta, Georgia 30334

This the 8th day of April, 2008.

Respectfully submitted,

TROUTMAN SANDERS, LLP



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PER CURIAM

Per Curiam

SUPREME COURT OF THE UNITED STATES

DEMARCUS ALI SEARS *v.* STEPHEN UPTON, WARDEN

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

No. 09–8854. Decided June 29, 2010

PER CURIAM.

According to an expert who testified during state postconviction relief, petitioner Demarcus A. Sears performs at or below the bottom first percentile in several measures of cognitive functioning and reasoning. The cause of this abnormality appears to be significant frontal lobe brain damage Sears suffered as a child, as well as drug and alcohol abuse in his teens. But because—in the words of the state trial court—his counsel conducted a penalty phase investigation that was "on its face . . . constitutionally inadequate," App. to Pet. for Cert. 27B, evidence relating to Sears' cognitive impairments and childhood difficulties was not brought to light at the time he was sentenced to death.

After finding constitutionally deficient attorney performance under the framework we set forth in *Strickland* v. *Washington*, 466 U. S. 668 (1984), the state postconviction court found itself unable to assess whether counsel's inadequate investigation might have prejudiced Sears. App. to Pet. for Cert. 29B–30B. Because Sears' counsel did present *some* mitigation evidence during Sears' penalty phase—but not the significant mitigation evidence a constitutionally adequate investigation would have uncovered—the state court determined it could not speculate as to what the effect of additional evidence would have been. *Id.*, at 30B. Accordingly, it denied Sears postconviction relief. *Id.*, at 34B. Thereafter, the Supreme Court of Georgia summarily denied review of his claims. *Id.*, at 1A.

Per Curiam

For the reasons that follow, it is plain from the face of the state court's opinion that it failed to apply the correct prejudice inquiry we have established for evaluating Sears' Sixth Amendment claim. We therefore grant the petition for writ of certiorari, vacate the judgment, and remand for further proceedings not inconsistent with this opinion.[1]

I

In 1993, a Georgia jury convicted Sears of armed robbery and kidnaping with bodily injury (which also resulted in death), a capital crime under state law. See Ga. Code Ann. §16–5–40(d)(4) (2006).[2] During the penalty phase of Sears' capital trial, his counsel presented evidence describing his childhood as stable, loving, and essentially without incident. Seven witnesses offered testimony along the following lines: Sears came from a middle-class background; his actions shocked and dismayed his relatives; and a death sentence, the jury was told, would devastate the family. See Pet. for Cert. 6–7. Counsel's mitigation

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[1] Although this is a state-court decision, it resolved a federal issue on exclusively federal-law grounds. We therefore have jurisdiction. 28 U. S. C. §1257; see also *Padilla* v. *Kentucky*, 559 U. S. ___ (2010) (reviewing state postconviction decision raising Sixth Amendment question).

[2] Sears was sentenced to death for the Kentucky murder of a woman whom he and an accomplice kidnaped in Georgia. Under Georgia law, a jury may "impose a death sentence for the offense of kidnapping with bodily injury on the ground that the offense of kidnapping with bodily injury was committed while the offender was engaged in the commission of the capital felon[y] of murder . . . ." *Potts* v. *State*, 261 Ga. 716, 720, 410 S. E. 2d 89, 93 (1991). So long as "the murder . . . [is] sufficiently a part of the same criminal transaction," it may count as a "statutory aggravating circumstanc[e] of the offense of kidnapping with bodily injury." *Ibid.*, 410 S. E. 2d, at 94. Sears has raised a categorical Eighth Amendment challenge to the constitutionality of his death sentence for a kidnaping offense, which we decline to reach. And any jurisdictional or constitutional issue with respect to Georgia's ability to execute Sears for a murder occurring in Kentucky is not before us.

theory, it seems, was calculated to portray the adverse impact of Sears' execution on his family and loved ones. 20 Record 5181. But the strategy backfired. The prosecutor ultimately used the evidence of Sears' purportedly stable and advantaged upbringing against him during the State's closing argument. With Sears, the prosecutor told the jury, "[w]e don't have a deprived child from an inner city; a person who[m] society has turned its back on at an early age. But, yet, we have a person, privileged in every way, who has rejected every opportunity that was afforded him." Pet. for Cert. 7 (quoting trial transcript; internal quotation marks omitted).

The mitigation evidence that emerged during the state postconviction evidentiary hearing, however, demonstrates that Sears was far from "privileged in every way." Sears' home life, while filled with material comfort, was anything but tranquil: His parents had a physically abusive relationship, Exh. 26, 6 Record 1676 (Affidavit of Demetrius A. Sears), and divorced when Sears was young, Exh. 22, *id.*, at 1654 (Affidavit of Virginia Sears Graves); he suffered sexual abuse at the hands of an adolescent male cousin, Exh. 26, *id.*, at 1681–1682; his mother's "favorite word for referring to her sons was 'little mother fuckers,'" Exh. 3, 2 Record 265 (Affidavit of Richard G. Dudley, Jr., MD); and his father was "verbally abusive," Exh. 37, 6 Record 1746–1747 (Affidavit of Carol Becci-Youngs),[3] and disciplined Sears with age-inappropriate

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[3]In the particular instance recounted in this affidavit, Sears' art teacher stated that his father "berate[d] [him] in front of" the school principal and her during a parent-teacher conference. Exh. 37, 6 Record 1746. The event was significant: "I'll never forget the way he bullied him," the art teacher explained, "Mr. Sears was so verbally abusive and made such a scene, that it made everyone in the room uncomfortable." *Ibid.* The art teacher had "never been in a conference where a parent severely criticized a child in the presence of his teachers and meant it, as Mr. Sears did." *Id.*, at 1747.

military-style drills, Exh. 3, 2 Record 263–264; Exh. 19, 6 Record 1622 (Affidavit of Frank Sears); Exh. 22, *id.*, at 1651; Exh. 28, *id.*, at 1694 (Affidavit of Kenneth Burns, Sr.). Sears struggled in school, demonstrating substantial behavior problems from a very young age. For example, Sears repeated the second grade, Exh. 6, 3 Record 500–501, and was referred to a local health center for evaluation at age nine, Exh. 7, *id.*, at 503, 504, 508. By the time Sears reached high school, he was "described as severely learning disabled and as severely behaviorally handicapped." Exh. A to Exh. 1, 2 Record 174–176 (Affidavit of Tony L. Strickland, M. S., Ph. D.).

Environmental factors aside, and more significantly, evidence produced during the state postconviction relief process also revealed that Sears suffered "significant frontal lobe abnormalities." Exh. 1, *id.*, at 147. Two different psychological experts testified that Sears had substantial deficits in mental cognition and reasoning—*i.e.*, "problems with planning, sequencing and impulse control," *ibid.*—as a result of several serious head injuries he suffered as a child, as well as drug and alcohol abuse. See 1 Record 37–40 (Testimony of Dr. Strickland); *id.*, at 95–96 (Testimony of Dr. Dudley). Regardless of the cause of his brain damage, his scores on at least two standardized assessment tests placed him at or below the first percentile in several categories of cognitive function, "making him among the most impaired individuals in the population in terms of ability to suppress competing impulses and conform behavior only to relevant stimuli." Exh. 1, 2 Record 148; see also 1 Record 37. The assessment also revealed that Sears' "ability to organize his choices, assign them relative weight and select among them in a deliberate way is grossly impaired." Exh. 1, 2 Record 149. From an etiological standpoint, one expert explained that Sears' "history is replete with multiple head trauma, substance abuse and traumatic experiences of the type expected" to

lead to these significant impairments. *Id.*, at 150; see also 1 Record 44.

Whatever concern the dissent has about some of the sources relied upon by Sears' experts—informal personal accounts, see *post*, at 5–7 (opinion of SCALIA, J.)—it does not undermine the well-credentialed expert's assessment,[4] based on between 12 and 16 hours of interviews, testing, and observations, see 1 Record 32, that Sears suffers from substantial cognitive impairment. Sears performed dismally on several of the forensic tests administered to him to assess his frontal lobe functioning. On the Stroop Word Interference Test, which measures response inhibition, *id.*, at 36–37, 99.6% of those individuals in his cohort (which accounts for age, education, and background) performed better than he did. *Ibid.* On the Trail-Making B test, which also measures frontal lobe functioning, *id.*, at 37–38, Sears performed at the first (and lowest) percentile. *Id.*, at 38. Based on these results, the expert's first-hand observations, and an extensive review of Sears' personal history, the expert's opinion was unequivocal: There is "clear and compelling evidence" that Sears has "pronounced frontal lobe pathology."[5] *Id.*, at 68.

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[4]Dr. Strickland, a psychologist, is the director of a mild head injury clinic and the Sports Concussion Institute at Centinella Freeman Medical Center in Los Angeles. 1 Record 30. He is an associate professor of psychiatry in residence at the University of California at Los Angeles and directs a memory disorder and cerebral palsy clinic for that university's department of neuroscience. *Id.*, at 30–31. The State had no objection to his being tendered as an expert in neuropsychology. *Id.*, at 31.

[5]During a colloquy with the court, Dr. Strickland further explained:

"THE COURT: But by taking some history of head injuries, coupled with the results of the tests that you've given, you can comfortably conclude that the results of the tests that you've given were a consequence of frontal lobe head injuries?

"THE WITNESS: Absolutely. And, moreover, Your Honor, the patient has a lesion on the front of his head, which is something I can observe." *Id.*, at 78.

Further, the fact that Sears' brother is a convicted drug dealer and user, and introduced Sears to a life of crime, 6 Record 1683–1686, actually would have been consistent with a mitigation theory portraying Sears as an individual with diminished judgment and reasoning skills, who may have desired to follow in the footsteps of an older brother who had shut him out of his life. *Post*, at 6. And the fact that some of such evidence may have been "hearsay" does not necessarily undermine its value—or its admissibility—for penalty phase purposes.[6] *Post*, at 5, n. 3.

Finally, the fact that along with this new mitigation evidence there was also some adverse evidence is unsurprising, *post*, at 7, given that counsel's initial mitigation investigation was constitutionally inadequate. Competent counsel should have been able to turn some of the adverse evidence into a positive—perhaps in support of a cognitive deficiency mitigation theory. In particular, evidence of Sears' grandiose self-conception and evidence of his magical thinking, *ibid.*, were features, in another well-credentialed expert's view,[7] of a "profound personality

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[6]Like Georgia's "necessity exception" to its hearsay rules, see Ga. Code Ann. §24–3–1(b) (2006), we have also recognized that reliable hearsay evidence that is relevant to a capital defendant's mitigation defense should not be excluded by rote application of a state hearsay rule. See *Green* v. *Georgia*, 442 U. S. 95, 97 (1979) *(per curiam)* ("Regardless of whether the proffered testimony comes within Georgia's hearsay rule, under the facts of this case its exclusion constituted a violation of the Due Process Clause .... The excluded testimony was highly relevant to a critical issue in the punishment phase of the trial"); see also *Chambers* v. *Mississippi*, 410 U. S. 284, 302 (1973) ("In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice"). We take no view on whether the evidence at issue would satisfy the considerations we set forth in *Green*, or would be otherwise admissible under Georgia law.

[7]Dr. Dudley, a psychiatrist, completed his internship and residency at Northwestern University Medical Center, and has been board certified in psychiatry by the American Board of Psychiatry and Neu-

disorder." 1 Record 104. This evidence might not have made Sears any more likable to the jury, but it might well have helped the jury understand Sears, and his horrendous acts—especially in light of his purportedly stable upbringing.

Because they failed to conduct an adequate mitigation investigation, *none* of this evidence was known to Sears' trial counsel. It emerged only during state postconviction relief.

II

Unsurprisingly, the state postconviction trial court concluded that Sears had demonstrated his counsel's penalty phase investigation was constitutionally deficient. See *Strickland*, 466 U. S., at 688 (explaining that first inquiry when evaluating Sixth Amendment ineffectiveness claim is whether counsel's representation "fell below an objective standard of reasonableness"). In its view, the cursory nature of counsel's investigation into mitigation evidence—"limited to one day or less, talking to witnesses selected by [Sears'] mother"—was "on its face . . . constitutionally inadequate." App. to Pet. for Cert. 27B.

What is surprising, however, is the court's analysis regarding whether counsel's facially inadequate mitigation investigation prejudiced Sears. See *Strickland*, *supra*, at 694. Although the court appears to have stated the proper prejudice standard,[8] it did not correctly conceptualize how that standard applies to the circumstances of this case.

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rology for more than 35 years. 1 Record 91–92. The State also had no objection to his being tendered as an expert in psychiatry. *Id.*, at 93.

[8]The court asked whether "there is a reasonable likelihood that the outcome of his trial would have been different if his counsel had done more investigation." App. to Pet. for Cert. 29B–30B; see *Strickland*, 466 U. S., at 694 ("The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome").

Because Sears' counsel did present some mitigation evidence during his penalty phase, the court concluded that "[t]his case cannot be fairly compared with those where little or no mitigation evidence is presented and where a reasonable prediction of outcome can be made." App. to Pet. for Cert. 30B. The court explained that "it is impossible to know what effect [a different mitigation theory] would have had on [the jury]." *Ibid.* "Because counsel put forth a reasonable theory with supporting evidence," the court reasoned, "[Sears] . . . failed to meet his burden of proving that there is a reasonable likelihood that the outcome at trial would have been different if a different mitigation theory had been advanced."[9] *Ibid.*

There are two errors in the state court's analysis of Sears' Sixth Amendment claim. First, the court curtailed a more probing prejudice inquiry because it placed undue reliance on the assumed reasonableness of counsel's mitigation theory. The court's determination that counsel had conducted a constitutionally deficient mitigation investigation, should have, at the very least, called into question the reasonableness of this theory. Cf. *Wiggins* v. *Smith*, 539 U. S. 510, 522 (2003) (explaining that "counsel's failure to uncover and present voluminous mitigating evidence at sentencing could not be justified as a tactical decision . . . because counsel had not 'fulfill[ed] their obli-

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[9]Channeling powers of telepathy, JUSTICE SCALIA asserts that what the trial court actually decided in this case is that "Sears' trial counsel presented a reasonable mitigation theory and offered evidence sufficient to support it, so the prejudice inquiry was more difficult—so difficult that Sears could not make the requisite showing." *Post*, at 4. Such a highly favorable reading of the trial court's analysis would be far more convincing had the trial court engaged with the evidence as JUSTICE SCALIA does. But it offered no such analysis in its opinion; indeed, it appears the court did not even conduct any real analysis, explaining that it was "*impossible* to know what effect" the evidence might have had on the jury. App. to Pet. for Cert. 30B (emphasis added).

gation to conduct a thorough investigation of the defendant's background'" (quoting *Williams* v. *Taylor*, 529 U. S. 362, 396 (2000); alteration in original)). And, more to the point, that a theory might be reasonable, in the abstract, does not obviate the need to analyze whether counsel's failure to conduct an adequate mitigation investigation before arriving at this particular theory prejudiced Sears. The "reasonableness" of counsel's theory was, at this stage in the inquiry, beside the point: Sears might be prejudiced by his counsel's failures, whether his haphazard choice was reasonable or not.

JUSTICE SCALIA chides the Court for concluding that the trial court assumed, rather than found, that counsel's mitigation theory was a reasonable one. *Post*, at 2. But our point is that any finding with respect to the reasonableness of the mitigation theory counsel utilized—in this case, family impact—is in tension with the trial court's unambiguous finding that counsel's investigation was itself so unreasonable as to be facially unconstitutional. This point is plain in *Williams:* We rejected any suggestion that a decision to focus on one potentially reasonable trial strategy—in that case, petitioner's voluntary confession—was "justified by a tactical decision" when "counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background." 529 U. S., at 396. A "tactical decision" is a precursor to concluding that counsel has developed a "reasonable" mitigation theory in a particular case.[10]

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[10]Moreover, the reasonableness of the theory is not relevant when evaluating the impact of evidence that would have been available and likely introduced, had counsel completed a constitutionally adequate investigation before settling on a particular mitigation theory. This point was also plain in *Williams*: "Whether or not . . . omissions [in the investigation] were sufficiently prejudicial to have affected the outcome of sentencing," they may nevertheless demonstrate deficiency. 529 U. S., at 396. The one inquiry, deficient mitigation investigation, is

Second, and more fundamentally, the court failed to apply the proper prejudice inquiry. We have never limited the prejudice inquiry under *Strickland* to cases in which there was only "little or no mitigation evidence" presented, App. to Pet. for Cert. 30B. True, we have considered cases involving such circumstances,[11] and we have explained that there is no prejudice when the new mitigating evidence "would barely have altered the sentencing profile presented" to the decisionmaker, *Strickland, supra*, at 700. But we also have found deficiency *and* prejudice in other cases in which counsel presented what could be described as a superficially reasonable mitigation theory during the penalty phase. *E.g., Williams, supra*, at 398 (remorse and cooperation with police); *Rompilla* v. *Beard*, 545 U. S. 374, 378 (2005) (residual doubt). We did so most recently in *Porter* v. *McCollum*, 558 U. S. ___, ___ (2009) *(per curiam)* (slip op., at 3), where counsel at trial had attempted to blame his client's bad acts on his drunkenness, and had failed to discover significant mitigation evidence relating to his client's heroic military service and substantial mental health difficulties that came to light only during postconviction relief, *id.*, at ___ (slip op., at 11–12). Not only did we find prejudice in *Porter*, but—bound by deference owed under 28 U. S. C. §2254(d)(1)—we also concluded the state court had *unreasonably* applied *Strickland*'s prejudice prong when it analyzed Porter's claim. *Porter, supra*, at ___ (slip op., at 13).

We certainly have never held that counsel's effort to present *some* mitigation evidence should foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant. To the contrary, we have consistently explained that the *Strick-*

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distinct from the second, whether there was prejudice as a result.

[11] See, *e.g., Wiggins* v. *Smith*, 539 U. S. 510, 515–516 (2003); *Strickland* v. *Washington*, 466 U. S. 668, 700 (1984).

land inquiry requires precisely the type of probing and fact-specific analysis that the state trial court failed to undertake below.[12] In the *Williams* decision, for instance, we categorically rejected the type of truncated prejudice inquiry undertaken by the state court in this case. 529 U. S., at 397–398. And, in *Porter*, we recently explained:

> "To assess [the] probability [of a different outcome under *Strickland*], we consider the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—and reweig[h] it against the evidence in aggravation." 558 U. S., at ____ (slip op., at 11) (internal quotation marks omitted; third alteration in original).

That same standard applies—and will necessarily require a court to "speculate" as to the effect of the new evidence—regardless of how much or how little mitigation evidence was presented during the initial penalty phase. Indeed, it is exactly this kind of probing inquiry that JUSTICE SCALIA now undertakes, *post*, at 4–8, and that the trial court failed to do. In all circumstances, this is the proper prejudice standard for evaluating a claim of ineffective representation in the context of a penalty phase mitigation investigation.

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[12] Whether it did so implicitly is far from apparent, notwithstanding JUSTICE SCALIA's suggestion to the contrary. See *post*, at 3–4. The trial court stated that the record was "largely silent" on "what [evidence] would have been shown if [additional mitigating evidence] had been sought." App. to Pet. for Cert. 28B. This is a curious assertion in light of the 22 volumes of evidentiary hearing transcripts and submissions in the record, which spell out the findings discussed above. It also undermines any suggestion that the court did, in fact, do the reweighing JUSTICE SCALIA believes it undertook; it is plain the record is not "largely silent." And it also undermines any suggestion that the court simply discounted the value of the testimony; had it made any such finding, the court could have easily stated, instead, that the record evidence was unpersuasive.

III

A proper analysis of prejudice under *Strickland* would have taken into account the newly uncovered evidence of Sears' "significant" mental and psychological impairments, along with the mitigation evidence introduced during Sears' penalty phase trial, to assess whether there is a reasonable probability that Sears would have received a different sentence after a constitutionally sufficient mitigation investigation. See *Porter*, *supra*, at ___ (slip op., at 11); *Williams*, *supra*, at 397–398; *Strickland*, *supra*, at 694. It is for the state court—and not for either this Court or even JUSTICE SCALIA—to undertake this reweighing in the first instance.

Accordingly, the petition for certiorari and the motion for leave to proceed *in forma pauperis* are granted. The judgment below is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

THE CHIEF JUSTICE and JUSTICE ALITO would deny the petition for a writ of certiorari.

SUPREME COURT OF THE UNITED STATES

DEMARCUS ALI SEARS *v.* STEPHEN UPTON, WARDEN

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

No. 09–8854. Decided June 29, 2010

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

The Court concludes, *ante*, at 7–12, that the Superior Court of Butts County, Georgia, made errors of law in applying the prejudice inquiry for ineffective-assistance-of-counsel claims under *Strickland* v. *Washington*, 466 U. S. 668 (1984). In my view there was no error of law, and the Court today remands for the state court to do what it has already done: find no reasonable likelihood that the mitigation evidence the Court details in its opinion would have persuaded a jury to change its mind about the death sentence for this brutal rape-murder.

The state habeas court responsibly executed the first step in the *Strickland* analysis, finding that the investigation of mitigation evidence by Sears' trial counsel was deficient performance. The issue here is the second step: whether Sears was prejudiced by that deficiency. As the Court acknowledges, *ante*, at 7, the state habeas court correctly stated the prejudice standard under *Strickland*: The defendant has the burden to establish "a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different." App. to Pet. for Cert. 24B–25B (citing 466 U. S., at 688, 694). "When applied to the sentencing phase of death penalty trials," that means "a reasonable probability that, absent [counsel's] errors, the sentencer would have concluded that the balance of the aggravating and mitigating circumstances did not warrant death." App. to Pet. for

Cert. 25B–26B.

The Court today concludes that there were two errors in the *application* of that proper standard. First, it reasons that the court erroneously "curtailed a more probing prejudice inquiry because it placed undue reliance on the assumed reasonableness of counsel's mitigation theory" at trial. *Ante*, at 8. That argument is flawed on several levels. To begin with, the state habeas court did not *assume* trial counsel's mitigation theory was reasonable; it *found* that it was. It said: "[A]lthough counsel failed to investigate thoroughly, they did develop a reasonable mitigation theory with evidence to support it." App. to Pet. for Cert. 30B. After interviews of roughly a dozen potential mitigation witnesses, who, with the exception of Sears' father, gave positive accounts of Sears and his family, see 7 Record 2025, 2051–2052; 8 *id.*, at 2129, 2291–2344, Sears' trial counsel developed a mitigation theory that Sears came from a good family and had a solid middle-class upbringing; that his offense was completely out of character; that he cooperated with police; and that sentencing Sears to death would devastate his family and friends, see *id.*, at 2124–2125; 19 *id.*, at 4861–4862, 4916–4917, 4954–4955; 20 *id.*, at 5181. To support that approach his attorneys called seven witnesses, including Sears' mother, four family friends, and his high school guidance counselor. See Pet. for Cert. 6–7 (citing trial transcript pages between 2375 and 2451). The state habeas court did not declare that this mitigation theory "might be reasonable, in the abstract," as the Court puts it, *ante*, at 8. Rather, it concluded that counsel "put forth a reasonable theory with supporting evidence." App. to Pet. for Cert. 30B.

The Court's argument is also flawed because the habeas court's reasonableness finding did *not* cause it to "curtai[l]" its prejudice inquiry, or lead to the conclusion that it could "obviate the need to analyze" whether pursuing a different

mitigation theory would have made a difference. *Ante*, at 9. The reasonableness finding merely meant that the prejudice determination had to be made by asking, not whether the jury's mind would probably have been changed by hearing Sears' new mitigation theory instead of hearing no mitigation theory at all; but rather whether it would probably have been changed by substituting Sears' new mitigation theory for the reasonable mitigation theory that was presented and rejected.[1] After hearing all the witnesses and other evidence Sears presented before it, the state court concluded that "it is just not possible to know what effect a *different* mitigation theory would have had." App. to Pet. for Cert. 30B (emphasis added).[2]

The second, "and more fundamenta[l]," legal error the Court alleges, *ante*, at 10–11, is really encased within the first. The Court claims that the state habeas court "limited the prejudice inquiry under *Strickland* to cases in which there was only 'little or no mitigation evidence' presented." *Id.*, at 10 (quoting App. to Pet. for Cert. 30B). The court erred, we are told, by determining that "present[ation of] *some* mitigation evidence should foreclose an inquiry into whether" Sears was prejudiced. *Ibid.* That is not a fair reading of the opinion. The state court did not hold that a defendant could never suffer prejudice whenever his counsel provided *any* mitigation evidence. Rather, it stated that "[t]his case *cannot be fairly com-*

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[1]The Court contends, *ante*, at 9, that there was a "tension" between the state court's conclusion that the investigation was deficient and its conclusion that the mitigation theory presented to the jury was reasonable. This terribly misreads the state court's opinion. It did not say (as the Court's point assumes) that counsel's *using* the mitigation theory they did was reasonable; it said that the *theory itself* was reasonable, making it hard to say whether a different theory would have persuaded the jury. This presents no conceivable "tension."

[2]On the fair reading we owe the state court, its opinion provides no basis for inferring that it failed to "engag[e] with the evidence" and "did not even conduct any real analysis." *Ante*, at 8, n. 8.

pared with those where little or no mitigation evidence is presented and where a reasonable prediction of outcome can be made." App. to Pet. for Cert. 30B (emphasis added). That is absolutely correct. This case is not like the prejudice cases on which the Court relies, where it could readily be said that the overlooked mitigation theory would have made a much deeper impression on the jury than the utterly unsupported theory (or absence of any theory) offered at trial. See *Porter* v. *McCollum*, 558 U. S. ___, ___ (2009) *(per curiam)* (slip op., at 12); *Rompilla* v. *Beard*, 545 U. S. 374, 378, 393 (2005); *Wiggins* v. *Smith*, 539 U. S. 510, 515, 537 (2003); *Williams* v. *Taylor*, 529 U. S. 362, 369 (2000). Sears' trial counsel presented a reasonable mitigation theory and offered evidence sufficient to support it, so the prejudice inquiry was more difficult—so difficult that Sears could not make the requisite showing. Clearly referring to the evidence in this particular case, the court said:

> "Although here, the Petitioner can argue that a prior appeal shows the difficulty one juror was having reaching the same verdict as the others, it is just not possible to know what effect a different mitigation theory would have had on her, just as it is impossible to know what effect it would have had on other jurors." App. to Pet. for Cert. 30B.

Since the habeas court made no legal error en route to its *Strickland* conclusion, the only basis for reversing the judgment here would be disagreement with the conclusion itself: that Sears had not established that his new mitigation theory would probably have caused the jury to impose a life sentence instead of death.

The Court makes no attempt to contradict that conclusion. Doing so would require a fact-intensive inquiry into the 22-volume record to measure the persuasiveness of the evidence supporting Sears' new mitigation theory—an

inquiry the Court purports to disavow, *ante*, at 12, but nonetheless tendentiously undertakes, *ante*, at 3–6. The reader might think the state habeas court's conclusion highly questionable from the Court's account, which recites as solid all the evidence supporting Sears' new mitigation theory, see *ante*, at 3–7. It is far from solid. Some is likely inadmissible as unreliable hearsay under Georgia law, see *Gissendaner* v. *State*, 272 Ga. 704, 714, 532 S. E. 2d 677, 688–689 (2000); *Gulley* v. *State*, 271 Ga. 337, 347, 519 S. E. 2d 655, 664 (1999)—such as much of the evidence for the uncorroborated second-hand claim that Sears "suffered sexual abuse at the hands of an adolescent male cousin," *ante*, at 3.[3] Other evidence a competent attorney would likely not have placed before the jury—such as all the testimony about Sears' childhood from his brother Demetrius, an admitted drug dealer and drug user, 6 Record 1682–1684, 1695, 1752, and a convicted felon (for bank fraud, wire fraud, identity theft, and cocaine trafficking), *id.*, at 1687. No juror would have been impressed by such a character witness.

Some of the evidence is incredible, such as the psychiatrist's assertion that Sears had "substantial deficits in mental cognition and reasoning . . . as a result of serious

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[3]The Court's reliance on *Green* v. *Georgia*, 442 U. S. 95, 97 (1979) *(per curiam)*, *ante*, at 6, n. 6, to suggest that this unreliable hearsay would be admissible for sentencing purposes is entirely misplaced. In *Green*, we held it violated constitutional due process to exclude testimony regarding a co-conspirator's confession that he alone committed the capital murder with which the defendant was charged. Our holding depended on "th[e] unique circumstances" of the case: the testimony to be used at sentencing was "highly relevant" and "substantial[ly]" reliable as a statement against penal interest made to a close friend, it was corroborated by "ample" evidence and was used by the State to obtain a conviction in a separate trial against the co-conspirator. 442 U. S., at 97. Here there are no such circumstances. The testimony is uncorroborated second-hand reporting from self-interested witnesses that is unreliable and therefore likely inadmissible.

head injuries he suffered as a child," *ante*, at 4. The serious head injuries consisted of Sears' hitting his head at a roller-skating rink sometime early in elementary school, 1 Record 76; 2 *id.*, at 225, running into an end table as a child, 6 *id.*, at 1651, and getting hit with a golf club sometime later in elementary school, 1 *id.*, at 79; 2 *id.*, at 225.[4] (The last of these major injuries might not have been introduced anyway, since that would have provided the prosecution an opportunity to refute both the extent of the injury and the mercy-worthiness of Sears, by introducing into evidence Sears' boast that when he was 11 or 12 he "beat the s*** out of" someone after he was hit on the head with a golf club, 8 *id.*, at 2195.) Likewise incredible was the assertion that Demetrius "introduced Sears to a life of crime," *ante*, at 6. According to testimony on which the Court relies, Demetrius would "never let [Sears] hang around" with him and his drug-dealing friends. 6 Record 1685–1686.

A jury also would have discredited the psychiatric testimony of Dr. Strickland that "[f]rom an etiological standpoint . . . Sears' 'history is replete with multiple head trauma, substance abuse and traumatic experiences of the type expected' to lead to these significant [mental] impairments," *ante*, at 4–5 (quoting 2 *id.*, at 150). As already noted, the evidence of brain-damaging trauma is nonexistent. The psychiatric testimony of Dr. Dudley relied upon the self-interested reporting of Sears himself and the

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[4]There is an unsubstantiated claim from Sears himself, 8 Record 2195, that when he was a teenager he was hit with a "hatchet" above his right eye. Of course, that is the same place where he collided with an end table, 6 *id.*, at 1651, leaving the "lesion"—better known as a scar—on his head that Dr. Strickland noted, *ante*, at 5–6, n. 5 (quoting 1 Record 78). There is no corroborating evidence for this event: no medical records, 1 *id.*, at 77, no other apparent scars, 2 *id.*, at 245; 6 *id.*, at 1651, and, tellingly, no family or friends to confirm what surely would have been memorable had it happened.

testimony of his less-than-trustworthy brother, Demetrius, see, *e.g.*, 1 Record 122, 133. And then there are the unfavorable parts of Dr. Dudley's testimony: Sears is a "narcissis[t]," *id.*, at 135, with a "grandiose" opinion of himself, *id.*, at 98–99; 2 *id.*, at 246. Dr. Dudley's affidavit portrays Sears as arrogant and self-centered, *id.*, at 246, 247, and notes what he termed Sears' "fantastical" boasting of his first sexual experience with a woman at the age of six and his other "innumerable sexual experiences," 1 *id.*, at 98–99, 100; 2 *id.*, at 246–247. It is hard to see how it could be thought probable that Sears' so-called "magical thinking," 1 *id.*, at 84, would have helped his plea for leniency, see *ante*, at 6–7. It seems to me more likely the jury would conclude that Sears' "profoun[d] personality disorder," 1 Record 104, made him exactly the kind of person who would commit heinous crimes in the future.

And some of the evidence the Court recounts is so utterly unlikely to affect a jury's determination that this brutal murder deserved death that its recitation is just plain hilarious. For example, the claim that Sears' father "was 'verbally abusive,'" *ante*, at 3, resting on nothing more than an art teacher's recollection that Sears' father "severely criticized" him—"and meant it"!—at a conference with the principal concerning his son's poor academic performance, 6 Record 1747; the claim that his father "disciplined Sears with age-inappropriate military-style drills," *ante*, at 3–4, which consisted of positively Von-Steubenesque acts such as dousing the kid with cold water when he refused to get up for school, and making him run extra laps after sports practices, 6 Record 1622; and the claim that his mother's "'favorite word'"—actually three words—to refer to her sons was scatological, *ante*, at 3 (quoting 2 Record 265).

While the Court takes pain to describe all the elements of Sears' new mitigation theory, down to the silliest, it does not trouble to describe the brutal circumstances of

the crime—which are at least just as relevant to assessing whether the different mitigation theory would probably have altered the sentence. But the jury heard all about them. See *Sears* v. *State*, 268 Ga. 759, 759–760, 493 S. E. 2d 180, 182 (1997). They heard Sears' confession that he kidnaped, raped, and murdered Gloria Wilbur, a 59-year old wife and mother. Sears, carrying a briefcase containing various instruments of mayhem—brass knuckles, knives, and handcuffs—and his accomplice, Phillip Williams, were surveying a supermarket parking lot on a Sunday evening in October 1990, looking for a car to steal to drive back home to Ohio from Georgia. As the victim was putting her groceries in the trunk of her car, Sears approached, punched her in the face with his brass knuckles, shoved her into the car, and drove to pick up Williams. Sears then handcuffed her and pulled her into the backseat as Williams drove. After they passed into Tennessee, Sears raped her. Later in the evening, after they had crossed into Kentucky, Sears told Williams to stop the car. Sears forced her, still handcuffed, into the woods by the side of the highway as she begged for her life. After throwing her on the ground, he stabbed her in the neck. In his confession he showed no regret or remorse for his heinous crimes.[5]

I do not know how anyone could disagree with the habeas court's conclusion that it is impossible to say that substituting the "deprived-childhood-*cum*-brain-damage" defense for the "good-middle-class-kid-who-made-a-mistake" defense would probably have produced a different verdict. I respectfully dissent.

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[5]The jury also heard from several corrections officers who testified that while Sears was incarcerated awaiting trial and sentencing, he racked up dozens of disciplinary infractions, including assaults on other inmates. "'Predatory,'" "'[i]ncorrigible,'" and incapable of reform was how they described him. 10 *id.*, at 2951–2957; 19 *id.*, at 4868.